

NO. 49172-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CRAIG POPEJOY,
Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the element of reasonable fear by Officer Veal, where Mr. Popejoy's threat was made over the telephone, the parties had never met, neither party knew what the other looked like, and there was no evidence that Mr. Popejoy knew how to find Officer Veal.
2. The state failed to prove beyond a reasonable doubt the element of a true threat where Officer Veal knew from experience that Mr. Popejoy was just angry about his truck being towed because in his experience people often became angry and upset when their vehicles were impounded due to the expense and difficulty retrieving the vehicle.

Issues Presented on Appeal

1. Did the state failed to prove beyond a reasonable doubt the element of reasonable fear by Officer Veal, where Mr. Popejoy's threat was made over the telephone, the parties had never met, neither party knew what the other looked like, and there was no

evidence that Mr. Popejoy knew how to find Officer Veal?

2. Did the state fail to prove beyond a reasonable doubt the element of a true threat where Officer Veal knew from experience that Mr. Popejoy was just angry about his truck being towed because in his experience people often became angry and upset when their vehicles were impounded due to the expense and difficulty retrieving the vehicle”

B. STATEMENT OF THE CASE

Mr. Popejoy was not charged with felony harassment threat to kill. Rather he was charged with felony harassment of an officer based on an alleged threat to cause bodily harm. CP 10-11. He was convicted of that charge. CP 43-55. Mr. Popejoy was also charged and convicted of bail jumping. CP 10-11,43-55. This timely appeal follows. CP 56.

Close to midnight Mr. Popejoy ran out of gas and pushed his truck off the road to safety. RP 44, 67. Officer Veal was dispatched to a truck located eight inches over the fog line, in a position as far as physically possible off the road way. RP 55, 68. Officer Veal ran

a license plate check but failed to see that the name on the records had been changed. RP 46. Officer Veal admitted that he knows how difficult it is for an owner to have a vehicle impounded and tries to reach out to the owner before calling for an impound. RP 46.

In this case, Mr. Veal did not correctly read his computer report, and accordingly, he did not attempt to contact Mr. Popejoy even though Mr. Popejoy was listed as the correct, registered owner. RP 46, 56. Because Officer Veal did not look closely at the computer record, he assumed that the truck was stolen and proceeded to request an impound. RP 47, 50, 56.

Mr. Popejoy walked 2-3 miles to retrieve a gas can and buy gas at the Shell station. RP 68-69. Sometime after 2:00AM, Mr. Popejoy's truck was missing when he returned with a can of gas to the location where he left his truck. RP 70. Mr. Popejoy called 911 to find out if his truck had been impounded. Id.

Dispatch provided Officer Veal with Mr. Popejoy's telephone number. RP 48. When Officer Veal called Mr. Popejoy, Mr. Popejoy was very upset that his truck had been impounded. RP 48-49. According to Officer Veal, Mr. Popejoy called him a "dumb motherfucker" and a "stupid cop". RP 50. According to Officer Veal,

Mr. Popejoy threatened to shoot him on sight if he ever saw Officer Veal and also threatened to sue him. RP 51. Officer Veal testified that he believed Mr. Popejoy because:

He was so angry, I – I really thought it was a legitimate threat. And at the time I didn't even know what he looked like. I don't know. I didn't meet him before. I wouldn't – I wouldn't have recognized him that night if he came up to me and said hi or anything, so. . . . Being that he was angry, I – I legitimately thought he was going to carry out those threats.

RP 51. Officer Veal also testified that he was scared because he works alone in Edgewood. RP 51. Officer Veal wrote an additional report because he believed Mr. Popejoy was angry at enforcement in general because Mr. Popejoy believed law enforcement officers they were all a bunch of liars. RP 52.

Officer Veal admitted, "I don't know anything about this guy. I – to me he was just an angry guy, mad about his vehicle being impounded." RP 53. Officer Veal explained in detail that he understood how expensive and difficult it is for an owner to have his car impounded. RP 46.

Mr. Popejoy threatened to sue Pierce County, not Officer Veal, and Mr. Popejoy did not threaten to shoot Officer Veal. RP 73, 84-85. Mr. Popejoy admitted to swearing at Officer Veal, and to

threatening to get him fired, but he never threatening to shoot Officer Vea. RP 74. Mr. Popejoy was held in the Pierce County for two hours and then transported to the King County Regional Justice facility by the Algonia police. RP 76.

C. ARGUMENT

1. THE STATE VIOLATED MR. POPEJOY'S DUE PROCESS RIGHTS BY FAILING TO PROVE BEYOND A REASONABLE DOUBT THAT MR. POPEJOY MADE A TRUE THREAT OR THAT DEPUTY VEA REASONABLY FEARED THAT MR. POPEJOY WOULD CARRY OUT A THREAT TO HARM, BOTH ESSENTIAL ELEMENTS OF FELONY HARASSMENT AS CHARGED.

- a. Standard of Review

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Constitutional questions are reviewed de novo. *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010).

Mr. Popejoy challenges the sufficiency of the evidence presented regarding the reasonableness of Officer Veas's fear and the lack of a true threat. The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found the facts at issue beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

In evaluating a sufficiency of the evidence claim, the Court assumes the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Homan*, 181 Wn.2d at 106. The appellate courts defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

b. Statute

To find a person guilty of harassment by threat of bodily injury, the state must prove beyond a reasonable doubt that the person: (a) without lawful authority, knowingly threatens to "cause bodily injury immediately or in the future to the person threatened or to any other person"; and (b) "by words or conduct places the person threatened in reasonable fear that the threat will be carried

out.” RCW 9A.46(1)(a)(i), (b). *Accord, State v. C.G.*, 150 Wn.2d 604, 609-10, 80 P.3d 594 (2003); *State v. Barragan*, 102 Wn. App. 754, 759, 9 P.3d 942 (2000).

Harassment becomes a felony if the person “harasses a criminal justice participant who is performing his or her official duties at the time the threat is made.” 9A.46(1)(b)(iii). However, “the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances” and “[t]hreatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.” RCW 9A.46.020(2)(b).

c. No True Threat

RCW 9A.46.020 only prohibits “true threats.” *State v. Boyle*, 183 Wn. App. 1, 7, 335 P.3d 954 (2014), *review denied*, 184 Wn.2d 1002 (2015). A true threat is 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 intention to inflict bodily harm upon or to take the life’ of another person.” *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d

1215 (2004) (*internal quotation marks omitted*) (*quoting State v. Williams*, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001)).

However, threats that are in fact merely jokes, idle talk, or **hyperbole** are not “true” threats prohibited by the First Amendment. *Schaler*, 169 Wn2d at 283-84 (*quoting, Kilburn*, 151 Wn.2d at 43).

d. The State Failed to Prove Mr. Popejoy Made a “True Threat.

Here, the allegation was a threat to “shoot”, but the state did not charge threat to kill which means that the state believed it could not prove that Mr. Popejoy actually intended to shoot Officer Veal, or that he had the present ability to do so. *C.G.*, 150 Wn.2d at 607-608, 610. Mr. Popejoy’s threats were mere hyperbole uttered in a moment of frustration on a telephone call, nowhere in the vicinity of Officer Veal.

Hyperbole is defined as: “aggrandizement, amplification, enlargement, exaggeration, extravagance, overemphasis, overenlargement, overstatement.” Free Legal Dictionary by Farlex, <http://legal-dictionary.thefreedictionary.com/hyperbole>. Mr. Popejoy was angry and spewed hyperbole. There was no evidence that Mr. Popejoy had the present or future ability to shoot Officer Veal

because he did not know him, he did not know where Officer Vea worked and there was no evidence that Mr. Popejoy had access to a gun. Cumulatively, the evidence was insufficient to establish that Mr. Popejoy made a true threat.

- e. The State Failed to Prove That Officer Vea Reasonably Feared that Mr. Popejoy Would Carry Out a Threat to Shoot to Cause Bodily Harm.

In this case, the state failed to prove that Officer Vea's fear was reasonable from an objective perspective. Officer Vea never met Mr. Popejoy, Mr. Popejoy did not know Officer Vea, neither party knew what the other looked like, and there was no evidence that Mr. Popejoy had a gun or knew where Officer Vea worked. RP 53, 75. In fact, Mr. Popejoy's ability to find Officer Vea was significantly diminished by the lack of direct involvement with Edgewood police in this case, and the particular use of a variety of law enforcement officials, and an out of county detention. Mr. Popejoy was initially detained by Pierce County, and then transported by Algona police to the King County Regional Justice Center. RP 76.

There was no evidence that Mr. Popejoy knew where Officer Veal worked, making it improbable for him to shoot Officer Veal on sight. Additionally, Officer Veal testified that Mr. Popejoy was understandably angry due to the expense and difficulty with having his truck impounded. RP 46, 53.

If Mr. Popejoy did threaten to shoot, the threat was not real and the fear not established under a reasonable doubt standard because there was only a very distant possibility that Mr. Popejoy could actually carry out the alleged "threat" because he had no ability to recognize, find, or encounter Officer Veal.

In *C.G.*, when the vice-principal escorted C.G. from class, she said, "I'll kill you Mr. Haney, I'll kill you[]" but the vice principal only testified that he had "concern" that C.G. "might try to harm him." *C.G.*, 150 Wn.2d at 607. *C.G.*, also "became angry, used profanity, and, when ordered to sit in a study carrel for a 'time out,' kicked the carrel, moved her chair, and made other noise." *C.G.*, 150 Wn.2d at 607. The State Supreme Court held that C.G.'s conviction required reversal because there was no evidence that the victim was placed in reasonable fear that C.G. would kill him. *Id.*

Here, Mr. Popejoy like C.G., was angry and belligerent and

Officer Vea like the vice-principal explained that he understood that Mr. Popejoy was just angry about the impound, and that he knew nothing about Mr. Popejoy other than “I – to me he was just an angry guy, mad about his vehicle being impounded.” RP 53.

While it is possible that Mr. Popejoy could have found Officer Vea somewhere in Pierce County and shot him, it was not probable. According to Officer Vea, the anger was related to the impound. Arguably, once Mr. Popejoy retrieved his truck that anger would have dissipated. Moreover, the possibility that Mr. Popejoy might carry out his threat to shoot did not establish that Officer Vea’s fear was reasonable in much the same manner that the Court in *C.G.* held that the vice-principal’s fears that C.G. **might** try to harm him, were insufficient to establish a reasonable fear that a threat to kill would be carried out. *Id.*

Unlike the instant case and *C.G.*, *Boyle*, 183 Wn. App. 1, is an example of a felony harassment case involving an officer where there was abundant evidence that the officer’s fear was reasonable. *Boyle*, 183 Wn. App. at 8-9. In *Boyle*, the defendant was drunk and in the officer’s presence, threatened to kill the officer and his family, said all police should die:

Boyle made a series of threatening statements. “People will look you and your family up and do them in. I would never threaten your family.” “I would never attack children, but cops and child molesters are fair game.” “People should shoot you guys in the face and I’ll be glad when they do. I would not do it myself, but you know someone will.” “Remember Forza Coffee, it was good stuff.” “Forza Coffee, that’s what should happen to all cops and their families.” “You wait and see what happens when I get out. I’m not threatening you.” “I hope your children die.” “F* *k your face, f* *ing swine. Read my record. Read it twice.” “Someone will kill you and your family. I’m not saying it’s going to be me, but someone is going to snipe cops and their families.”

Boyle, 183 Wn. App. at 5.

By contrast in this case, Mr. Popejoy did not in any way indicate that he could carry out his alleged threat to shoot. He did not reference other killings, he did not reference his own past, and he did not know Officer Vea. RP 53, 75. The evidence presented in this case falls far short of the required proof beyond a reasonable doubt present in *Boyle*.

Under the due process clause, the state’s failure to prove essential elements of the crime charged requires this Court to reverse and remand for dismissal of the charge with prejudice.

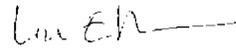
D. CONCLUSION

Mr. Popejoy respectfully requests the Court reverse and

remand for dismissal of the charge with prejudice based on insufficient evidence that Officer Veas's fear was reasonable and that that Mr. Popejoy made a true threat: essential elements of the crime of harassment as charged in this case.

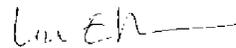
DATED this 22nd day of November, 2016.

Respectfully submitted,



LISE ELLNER
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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office (at pcpatcecf@co.pierce.wa.us) and Craig Popejoy, 126 2nd Ave S., Algona, WA 98001 a true copy of the document to which this certificate is affixed on November 22, 2016. Service was made by electronically to the prosecutor and to Craig Popejoy by depositing in the mails of the United States of America, properly stamped and addressed.



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