

NO. 49172-9-II

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

STATE OF WASHINGTON, RESPONDENT

v.

CRAIG POPEJOY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 16-1-00230-9

BRIEF OF RESPONDENT

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

1. In light of the sufficiency of the evidence standards, was sufficient evidence introduced to prove the threat and reasonable fear elements of felony harassment where the officer testified about the defendant's threats and where he took precautions to protect himself and other officers from the defendant as a result of those threats? (Appellant's assignment of error no.1)

B. STATEMENT OF THE CASE.

1. Procedure

On January 15th, 2016, Pierce County Prosecutors charged Appellant Craig Popejoy (the "defendant") with felony harassment (Count I). CP 1-2. An Amended Information was filed on April 4th, 2016, and added a charge of Bail Jumping (Count II). CP 10-1. The case proceeded to trial before The Honorable Frank Cuthbertson. 3RP 1.¹

On June 2, 2016, a jury convicted the defendant of both counts. CP 12-13. The court sentenced defendant within the standard range to 3 months on each count to be served consecutively. CP 50; 6RP 124-5. The court

¹ The Verbatim Report of Proceedings is contained in 6 volumes and will be referred to as the following throughout this brief: 1RP(2/8/16); 2RP (3/24/16); 3RP (6/1/16-morning); 4RP (6/1/16-afternoon); 5RP (6/2/16); 6RP (6/17/16).

imposed only mandatory legal financial obligations, waving all discretionary fees. CP 125. Defendant filed a timely appeal. CP 56.

2. Facts

The case arose from a routine impoundment of the defendant's truck. On January 11th, 2016, Pierce County Deputy Sheriff Tyson Vea found a vehicle on the side of the road very near the fog line. In an attempt to identify the vehicle's owner, Deputy Vea ran the license plate number and found it was expired. 5RP 46. Unable to locate the truck's owner, Deputy Vea ordered the vehicle impounded to mitigate the potential traffic hazard. 5RP 46-5.

The next day a 911 dispatcher contacted Deputy Vea and told him the defendant wanted to speak with him concerning the impounded vehicle. 5RP 47. The deputy contacted defendant and introduced himself with his name, duty position, and badge number. 5RP 48.

The defendant was very angry and upset throughout the call because Deputy Vea impounded his vehicle. 5RP 48. Defendant called the deputy "a dumb motherfucker" and "a stupid cop" among other insults. 5RP 48-50, 52. He told Deputy Vea that he planned to find him and shoot him on sight. He threatened to shoot the deputy again and then threatened to sue him. 5RP 50-1. Deputy Vea attempted to calm defendant down and apologized for the impoundment several times. 5RP 49-51.

Deputy Vea testified that he took defendant's threat to kill him seriously and was genuinely scared following the threat. 5RP 51. He issued a report to other law enforcement agencies warning them of defendant's threats and advising them to be on the lookout for the defendant. 5RP 51.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE WAS SUFFICIENT TO PROVE ALL OF THE ELEMENTS OF FELONY HARASSMENT BEYOND A REASONABLE DOUBT.

For an appellate court to find there was sufficient evidence for a conviction, it must determine, after viewing the evidence in the light most favorable to the State, whether any rational jury could have found the defendant guilty beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences which can be drawn from it. *State v. Thereoff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Salinas*, 119 Wn.2d at 201. Deference must be given to the trier of fact who is responsible for determining witness credibility, resolving conflicting testimony, and evaluating the persuasiveness of evidence presented at trial. Washington Const. art. I, §21; *State v. Furth*, 5 Wn.2d 1, 104 P.2d 925 (1940)("Courts cannot trench on

province of jury upon questions of fact. . . .”); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the case before the Court the defendant claims the State failed to present sufficient evidence to convict him of harassment. Brief of Appellant at 8-9. The elements of the offense were submitted to the jury as follows:

- (1) That on or about the 12th day of January, 2016, the defendant knowingly threatened:
 - a. To cause bodily injury in the future to Tyson Vea, and
- (2) That the words of the defendant placed Tyson Vea in reasonable fear that the threat would be carried out; and
- (3) That the defendant acted without lawful authority; and
- (4) That the person harassed, Tyson Vea, was a criminal justice participant who was performing his official duties at the time the threat was made; and
- (5) That the acts occurred in the County of Pierce.

CP 24 (Jury Instruction No. 11).

Defendant’s insufficiency arguments are limited to the first two elements. Brief of Appellant 7-10. His challenge fails because the evidence presented, when viewed in the light most favorable to the State, allows a reasonable jury to find the State presented sufficient evidence to prove both elements.

Defendant argues that the evidence supports an inference that he did not make a threat or put Deputy Vea in reasonable fear. Brief of Appellant at 7-11. It is likely that even the defendant would admit that an expression of intent to hunt down and shoot a law enforcement officer was threatening. Thus even if it may be true that threatening words such as the defendant's might be considered non-threatening by some this is not enough to satisfy the sufficiency standard. The defendant fails to acknowledge that the threatening character of his words makes them a threat if they would be considered threatening by any reasonable person. The applicable standard of review requires that the evidence be viewed in the light most favorable to the State, not the defendant. *State v. Green*, 94 Wn.2d at 220-22; *State v. Camarillo*, 115 Wn.2d at 71; *State v. Carver*, 113 Wn.2d 591, 604, 789 P.2d 306 (1990). Hence if the defendant's actions and words can be viewed as both threatening and non-threatening, the sufficiency standard has been satisfied.

To prevail under the standard, defendant must show that the inferences supporting guilt are all unreasonable. Conversely, any reasonable inference supported by the evidence is sufficient to sustain the conviction. Defendant's sufficiency claim is defeated because several reasonable inferences establish defendant made a threat and instilled reasonable fear in Deputy Vea. When the evidence is viewed in the light most favorable to the State, the reasonable inferences support the guilty verdict.

a. The State proved that the defendant made a threat against Deputy Vea.

The State presented sufficient evidence to allow a reasonable jury to find that the defendant made a threat against Deputy Vea. The trial court's instructions to the jury defined threat as, "Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person." CP 27 (Jury Instruction 8). The defendant does not identify any deficiency in this instruction. Had the threat issue been brought before this Court as a result of an overbreadth motion, the defendant's arguments about the term "true threat" might carry more weight. *See e.g. State v. Kilburn*, 151 Wn.2d 36, 41-43, 84 P.3d 1215 (2004). In free expression cases "A true threat is a serious threat, not one said in jest, idle talk, or political argument. . . Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker." *Id.* at 43-44 (citations omitted).

Here the defendant made no free expression claim. He was communicating one on one with a deputy, not disseminating an opinion publicly concerning law enforcement or impoundment of vehicles. His verbalizations would have been considered a true threat if he had brought a freedom of expression challenge and are no less a threat when measured by the instruction given to the jury.

A 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. Locke*, 175 Wn. App 779, 789, 307 P.3d 771 (2013). A threat does not require the speaker to actually intend or be able to carry out the threat, only that a reasonable speaker would foresee that the threat would be considered serious. *State v. Boyle*, 183 Wn. App. 1, 7–8, 335 P.3d 954, 957 (2014). Courts evaluate a threat based on the totality of the circumstances and do not limit the inquiry to a literal translation of the words spoken. *State v. Locke*, 175 Wn. App at 790.

Defendant called 911 and furiously demanded to speak with the officer who impounded his truck. Defendant was “angry” and “very, very upset” when he spoke with Deputy Vea. 5RP 48-49. Defendant called Deputy Vea “a dumb motherfucker” and “a stupid cop.” 5RP 50. Deputy Vea apologized to defendant several times and attempted to calm him down to no avail. 5RP 51-52. Defendant told the deputy he had cameras on the car, would shoot the deputy on sight, and that after he retrieved his car he would come shoot him. 5RP 51.

Defendant’s anger infused speech and multiple direct statements to shoot Deputy Vea were sufficient for a jury to find that the threats could foreseeably be interpreted as an expression of intent to harm. Defendant told Deputy Vea several times he would find him and shoot him. The context of

his comments enhances the magnitude of the statements. Defendant was very angry and berating Deputy Vea for impounding his truck. Even after Deputy Vea issued several apologies and attempted to defuse the situation, defendant continued on his tirade and made more statements about coming to shoot the deputy.

Defendant argues he was “spewing hyperbole” and did not have the means to shoot Deputy Vea. Brief of Appellant at 8-9. This argument is not relevant to the present inquiry. A threat only requires that a reasonable speaker would foresee the statements made as being considered a threat, not the actual intent or ability to carry out the threat. *State v. Boyle*, 183 Wn. App. at 7–8. A reasonable person would foresee that calling a law enforcement officer in a fit of anger, repeatedly threatening to find him and shoot him would be viewed as an actual threat. Therefore, defendant’s statements and their context, when viewed in the light most favorable to the State, go well beyond mere hyperbole and allow a reasonable jury to find defendant made a threat against Deputy Vea.

b. Deputy Vea reasonably feared defendant’s actual threat.

To prove felony harassment, the State must show defendant placed the victim in reasonable fear of a threat being carried out. *State v. C.G.*, 150

Wn.2d 604, 609, 80 P.3d 594 (2003). “The state must prove the threat made and threat feared are the same.” *Id.* at 608.

Deputy Vea testified that he legitimately believed defendant would carry out his threats. The deputy’s fear was compounded by the fact he worked alone and would not have been able to identify defendant if he approached him. 5RP 51. Defendant knew the deputy’s name, employer, duty position, and badge number. 5RP 48. Deputy Vea was sufficiently concerned about the defendant’s threats that he disseminated a report to other law enforcement agencies describing defendant, his threats, and encouraging officers in the area to be especially vigilant when dealing with the public. 5RP 53. All of these factors, when considered in the totality of the circumstances and the light most favorable to the State, show Deputy Vea reasonably feared defendant’s threats.

Defendant relies on *State v. C.G.*, to argue that it was unreasonable for Deputy Vea to fear defendant would carry out his threat to kill him. Brief of Appellant at 9-11. Defendant’s reliance is misplaced. In *C.G.*, a student threatened to kill a school administrator and was charged with harassment predicated on a threat to kill. *State v. C.G.*, 150 Wn.2d at 607. At trial, the administrator testified that he was not afraid defendant would kill him, only hurt him. *Id.* While the administrator’s fear might have been sufficient for misdemeanor harassment it was not sufficient for felony harassment. *Id.* at 611-12.

Based on the reasoning in *C.G.*, the outcome of this case might have been different had the victim not been a law enforcement officer. A threat of simple bodily harm, and subsequent fear of bodily harm, against a “criminal justice participant who is performing his or her official duties” is sufficient for felony harassment. RCW 9A.46.020(2)(b)(iii). Therefore, if the victim in *C.G.* had been a law enforcement officer, not a school official, the threat to kill and subsequent fear of bodily harm, even absent a fear of death, would have been sufficient to sustain a conviction for Felony harassment.

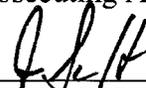
Deputy Vea’s fear that defendant would carry out the actual threat made, distinguishes this case from *C.G.* Deputy Vea testify “I legitimately thought [defendant] was going to carry out those threats.” 5RP 51. Unlike *C.G.*, Deputy Vea feared the actual harm threatened against him by the defendant. Therefore, the evidence presented at trial, when viewed in the light most favorable to the State, allows a reasonable jury to find Deputy Vea reasonably feared defendant’s actual threat.

D. CONCLUSION.

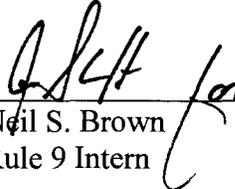
For the foregoing reasons the State respectfully requests
defendant's sentence be affirmed.

DATED: Thursday, January 19, 2017

MARK LINDQUIST
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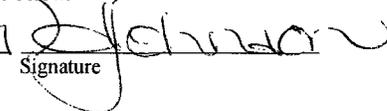
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