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Division II
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NO. 50281-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

THORMOD SKALD,

Appellant.

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

The Honorable Leila Mills, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE SKALD'S STATEMENT ABOUT SHOOTING GUNNLAUGSDOTTIR WAS A TRUE THREAT.

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Crimes that have a threat to commit bodily harm as an element require the State to prove the threat was a “true threat” so as not to violate the First Amendment’s free speech clause. State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001).

A conviction must be reversed where, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). Skald contends, for reasons set forth more fully in the opening brief, that insufficient evidence exists to sustain the felony harassment conviction because the State failed to prove that Skald's statements amounted to a true threat. Brief of Appellant (BOA) at 8-15.

In response, the State contends Skald's argument "...is without merit because the jury was properly instructed on the meaning of true threat..." and "Skald makes no argument that this instruction is not a correct statement of the law." Brief of Respondent (BOR) at 7-9. Such an argument misconstrues Skald's argument. Skald does not challenge the jury instruction defining "true threat." Rather, Skald argues there is insufficient evidence that his statement allegedly threatening to shoot Gunnlaugsdottir amounts to a true threat within the meaning of the First Amendment.

The State cites to no authority that in order to challenge the sufficiency of the evidence, Skald must also challenge the definitional jury instruction of "true threat." Nor could it. Skald's opening brief discusses in detail, cases which hold that when the First Amendment true threat analysis is implicated, reviewing courts must independently examine the record to ensure that protected speech is not penalized. See BOA at 10-12 (citing and discussing Kilburn, 151 Wn.2d 36; Watts v. United States, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)).

Finally, the State suggests that it was "...evident to the jury" that Skald's comments about shooting Gunnlaugsdottir would be taken as a true expression of intent to kill Gunnlaugsdottir. BOR at 9-10. As evidenced by the jury's inability to reach a verdict on the first two charged

counts of felony harassment, and the State's subsequent dismissal of those charges however, the record shows the opposite to be true.

Moreover, as discussed fully in the opening brief, whether a true threat has been made is determined under an objective standard that focuses on the speaker, not the listener. Given Skald's particularly dark humor relationship with Hasseries and Golding, the fact that prior similar statements involving Gunnlaugsdottir's death were admittedly taken as jokes, and that neither woman told Skald that his comments were inappropriate, a reasonable person in Skald's position would not foresee that his comments about shooting Gunnlaugsdottir would be taken as a true expression of intent to kill Gunnlaugsdottir. BOA at 12-14.

The State failed to meet its burden of proving Skald's statement amounted to a true threat. This Court must reverse the felony harassment conviction and remand for dismissal of the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998).

2. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT GUNNLAUGSDOTTIR WAS PLACED IN REASONABLE FEAR THAT SHE WOULD BE KILLED.

Skald also argues his conviction for felony harassment must be reversed because the State failed to prove beyond a reasonable doubt that Skald's alleged threat to shoot Gunnlaugsdottir placed her in reasonable

fear that she would be killed. BOA at 15-21. In response, the State argues the evidence is sufficient because "[Gunnlaugsdottir] found about the threats and testified that she was very concerned by them." BOR at 10-11. But, even assuming the State's contention is correct this is still not sufficient evidence to convict Skald of felony harassment.

Under RCW 9A.46.020, the State was required to prove that Skald's alleged statement to shoot Gunnlaugsdottir with a shotgun placed Gunnlaugsdottir in reasonable fear that that specific threat to kill would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b). Here, the State proved, at best, only that Gunnlaugsdottir took the non-specific statements that were relayed to her, "very" seriously. As discussed in the opening brief, under State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003), Gunnlaugsdottir's ambiguous testimony is insufficient to prove that she was placed in reasonable fear that Skald would actually carry out his alleged threat to kill her with a shotgun. BOA at 18-19.

The State makes no attempt to distinguish C.G. from the present case. Where, as here, the State fails to respond to Skald's argument, the State concedes that point. See In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed by failing to argue this point, respondents appear to concede it.").

The State presented no evidence to prove that Gunnlaugsdottir was placed in reasonable fear that Skald would actually carry out his alleged threat to kill her with a shotgun. Reversal and dismissal of the felony harassment conviction is required.

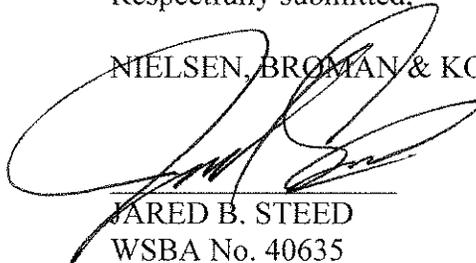
B. CONCLUSION

For the reasons discussed above, and in the opening brief, this Court should reverse Skald's conviction for felony harassment for insufficient evidence.

DATED this 13th day of December, 2017.

Respectfully submitted,

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