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Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

THORMOD * SKALD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-01295-5

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the threats made constitute true threats as that term is defined in First Amendment jurisprudence?
2. Whether there was sufficient evidence to support the element of reasonable fear in this felony harassment prosecution?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Thormod Skald was charged by information filed in Kitsap County Superior Court with felony harassment with a special domestic violence allegation. CP 1-2. Three months later, a first amended information added two additional counts of felony harassment each with a domestic violence special allegation. CP 7-10.¹

The jury was instructed on true threat. CP 27 (instruction 9).

Skald was convicted on one count—count III—and the jury gave an affirmative answer on the domestic violence special allegation. CP 35 (verdict form); CP 38 (special verdict form). The jury was deadlocked as to counts I and II. CP 40. The state moved to dismiss counts one and two at the sentencing hearing. RP, 2/17/17, 6-7. Skald was sentenced within the standard range. CP 43. The present appeal was timely filed. CP 56.

¹ The defense argued against the amended information asserting that the three counts constitute a continuing course of conduct for one count. RP, 1/23/17, 5-6.

B. FACTS

Witness Anjela Krystyne Scott Hasseries worked for Skald in his ice cream business for about a year and a half. RP, 1/25/17, 84. She knew of Skald's wife, Asta Gunnlaugsdottir, but not well. RP, 1/25/17, 85. She knew that Skald and Ms. Gunnlaugsdottir were in a custody dispute and she had testified in that matter on Skald's behalf. Id.

Skald spoke of the issues between himself and Ms. Gunnlaugsdottir constantly beginning in 2015. RP, 1/25/17, 86. They, Ms. Hasseries and Skald, joked that it would be cheaper for Skald to hire a hitman than a lawyer. Id. This joking was regarded as Skald just blowing off steam. Id. But as time went on, Skald's threats became more specific. Id.

Skald said that if things did not go his way, he would just shoot her in the parking lot of the courthouse after the trial. RP, 1/25/17, 87. This was referred to as the "shotgun plan." Id.

Skald inquired of Ms. Hasseries about a substance called dimethylmercury. RP, 1/25/17, 87. He told her that the substance could kill if gotten on a person's skin. Id. He thought it would work well if he got some on Ms. Gunnlaugsdottir, she returned to Iceland, and died there. Id. Skald would still be in America and the poison would not be traced to

him. Id. When Ms. Hasseries began to make a notation in her phone to look up the substance, Skald said not to as he did not want his friends involved. RP, 1/25/17, 87-88. This conversation left Ms. Hasseries feeling “creeped out.” RP, 1/25/17, 88. She took him seriously when he made this threat. Id. She took him seriously “once he started talking about having an actual plan.” RP, 1/25/17, 90.

Eventually, Ms. Hasseries called the police. Id. This because she believed that if she had not called the police “there’s a very good chance that Asta would be dead today.” RP, 1/26/17, 92. She believed that if she did not call “[h]e would have killed Asta.” RP, 1/25/17, 93. Ms. Hasseries had a medical problem around the time she began to take Skald’s threats seriously and had joked with him that she should commit suicide in a car with Asta being killed as well. RP, 1/25/17, 96. She said that Skald took this seriously and by that reaction she knew he had gone too far. Id.

Ms. Hasseries called police in part because she knew Ms. Gunnlaugsdottir would soon be coming to America to attend a child custody hearing. RP, 1/25/17, 102.

Witness Amber Golding also worked for Skald. RP, 1/25/17, 117. She did not know Ms. Gunnlaugsdottir but knew of her. Id. Ms. Golding had written a statement on behalf of Skald for the custody dispute. RP,

1/25/17, 118.

Ms. Golding recalled a phone conversation with Skald during which he asked about a poisonous plant. RP, 1/25/17, 118-19. Skald was looking for poison with which to poison Ms. Gunnlaugsdottir. Id. He planned to extract the poison and either inject her or get her to ingest the poison. Id. This plan upset Ms. Golding raising a “red flag.” Id.

Ms. Golding did not like Ms. Gunnlaugsdottir because she had accused her of having an affair with Skald. RP, 1/25/17, 119-20.

Ms. Golding indicated that Skald shared another homicidal plan with her: use of dimethylmercury as he had discussed with Ms. Hasseries. RP, 1/25/17, 120. Skald wanted to know if Ms. Golding had a background in chemistry and said he knew that the substance was odorless and takes some time to kill a person who is exposed. Id. He intended to expose Ms. Gunnlaugsdottir to the chemical. Id. This information worried Ms. Golding because Skald had actually researched the use of dimethylmercury. RP, 1/25/17, 121.

Ms. Golding knew Skald was angry at his ex-wife over the child custody issues. RP, 1/25/17, 121. She also became aware that Skald had failed to procure the dimethylmercury. Id. Since his poison plans had failed, Skald said he would just shoot her in the parking lot with his shotgun. RP, 1/25/17, 121-22. Ms. Golding did not believe that Skald

was joking. Id. She thought he was serious and was very concerned because Skald had actually made plans to kill her. Id. She quoted Skald as saying “I’ll be damned if that bitch leaves with my kids again.” RP, 1/25/17, 122-23.

Asta Gunnlaugsdottir testified that she met Skald in Iceland, they quickly became romantic and got married. RP, 1/25/17, 141. They have two children who were four and six years old at the time of trial. Id. They remained in Iceland for approximately a year and a half. Id. They moved to Florida in 2007 later moving to Washington. Id. They had an ice cream business in Poulsbo, Washington. RP, 1/25/17, 142.

Ms. Gunnlaugsdottir knew of Amber Golding and Anjela Hasseries but had never met either of them. RP, 1/25/17, 142. Over time, Ms. Gunnlaugsdottir became depressed and uncomfortable in the relationship. Id. Skald was controlling: he decided things like when she could go to the bathroom, whether she could sit down, whether she could wear sunglasses. RP, 1/25/17, 143. She was isolated and not allowed to socialize. RP, 1/25/17, 143-44. She felt depressed and stuck in the relationship. Id.

Ms. Gunnlaugsdottir went back to Iceland with the children ostensibly to secure a loan for the business. RP, 1/25/17, 144. There, she felt restored to personal freedom and, after the loan was denied, she

decided to seek a divorce. RP, 1/25/17, 144-45. The divorce proceeding lasted for over a year. Id.

Ms. Gunnlaugsdottir became aware that what Skald had been saying was reported to the police. Id. By Skype, she communicated with a police officer. Id. She was very concerned by what the officer told her. RP, 1/25/17, 146. At the time, she had plans to return to the United States to comply with court orders and attend a further custody hearing. Id. But her visa did not come in time to attend the hearing. RP, 1/25/17, 149.

The police officer that Ms. Gunnlaugsdottir spoke to was David Shurick, a Poulsbo Police Department detective. RP, 1/25/17, 110. He had been called by a doctor who told him that her client, Anjela Hasseries, had information for him. RP, 1/25/17, 111-12. The detective spoke with Ms. Hasseries, Ms. Golding, and Ms. Gunnlaugsdottir. Id. When he spoke with Ms. Gunnlaugsdottir, she was still in Iceland. Id. He told Ms. Gunnlaugsdottir what he had learned in the investigation. RP, 1/25/17, 112-13. Upon arresting Skald, he found a shotgun and some shells in Skald's home. RP, 1/25/17, 113.

III. ARGUMENT

A. THE MANNER OF AND CONTEXT AND CIRCUMSTANCES OF SKALD'S THREATS MEET THE REQUIREMENTS OF A TRUE THREAT.

Skald argues that there was insufficient evidence to prove a true threat by Skald toward Ms. Gunnlaugsdottir. This claim is without merit because the jury was properly instructed on the meaning of true threat and independent review of the record reveals that Skald's plots to kill his estranged wife met that definition.

The standard of review on "true threat" issues is called "independent review." *State v. Kilburn*, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004). The scope of review is limited: "this review is limited to review of those "crucial" facts that necessarily involve the legal determination whether the speech is unprotected." *Id.*

Threats of violence are not protected by the First Amendment because there is a strong interest in "protect[ion of] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *State v. J.M.*, 144 Wn.2d 472, 478, 28 P.3d 720 (2001) (parenthesis by the court), *quoting R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387–88, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). But the present statute does impact "pure

speech” and therefore the actionable threat must be a “true threat.” See *State v. Kilburn*, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004). “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 intention to inflict bodily harm upon or to take the life” of another. 151 Wn.2d at 43 (internal quotation and citation omitted). Whether or not a true threat is made is determined under an objective test focused on the threatener. 151 Wn.2d at 44.

In the present case, the jury was instructed on true threat. The instruction provides

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.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 27 (instruction 9). This instruction is taken verbatim from WPIC 2.24 omitting the bracketed “political argument” language that has no application in the present case.² The comment, citing *Kilburn, supra*, says

² Political speech and the right to freely associate were paramount considerations in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) and *Watts v. U.S.*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) and the analysis in those cases therefore has little application to the present case.

that the instruction “directs jurors to consider foreseeability from the standpoint of a reasonable person in the position of the speaker.” Skald makes no argument that this instruction is not a correct statement of the law. Moreover, jurors are presumed to follow the trial court’s instructions. *See State v. Hanna*, 123 Wn.2d 704, 711, 871 P.2d 135 (19194) (En banc). And, a reviewing court’s “independent review” “does not extend to factual determinations such as findings on credibility...” *State v. Johnston*, 156 Wn.2d 355, 365-66, 127 P.3d 707; *see also State v. Kilburn, supra*, at 50 (First Amendment true threat analysis does not affect deference reviewing court gives to trier-of-fact determinations of credibility).

Applying these standards to the present case, it is clear that Skald’s statements toward his estranged wife happened under circumstances where a reasonable person would construe them as serious expressions of intention to carry out the threats. The circumstances here are that Ms. Gunnlaugsdottir had taken herself and the couple’s children nearly halfway around the world from him. Then, she files for divorce and a child custody dispute ensues. These circumstances, as related by Ms. Hasseries, caused Skald to obsess about his situation and speak of Ms. Gunnlaugsdottir constantly. Further, the record is clear that his obsession was not kindly toward Ms. Gunnlaugsdottir. The record is clear that Skald’s state of mind was that she intended to take his children from him

and he was angry about it. This a classic domestic violence type of context. Given these circumstances, that Skald might utter sincere threats toward her is unsurprising if unfortunate.

Moreover, the unsurprising context of Skald's remarks would be evident to the jury. The jurors knew of the circumstances in which Skald spoke his threats. They knew, from the testimony of both Ms. Hasseries and Ms. Golding, that what began in jest and consistently with Skjald's noted dark humor, ripened into a full blown intention to actually kill Ms. Gunnlaugsdottir. They heard the testimony that Skald was angry about the situation. Armed with a correct true threat instruction, the jury properly found a true threat herein. Insofar as the jury's finding on this element includes its assessment of the credibility of the evidence, that finding should not be disturbed on review.

B. SUFFICIENT EVIDENCE SUPPORTED THE REASONABLE FEAR ELEMENT OF FELONY HARASSMENT.

Skald next claims that the evidence was insufficient to establish that Ms. Gunnlaugsdottir was placed in reasonable fear by Skald's threats. This claim is without merit because taken in a light most favorable to the state, the evidence established that Ms. Gunnlaugsdottir found out about

the threats and testified that she was very concerned by them.

Here, the normal sufficiency of the evidence standard of review applies. *State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016). Thus, “[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). A reviewing court defers to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Rodriquez*, 187 Wn.App. 922, 930, 352 P.3d 200, *review denied*, 184 Wn.2d 1011, 360 P.3d 817 (2015).

RCW 9A.46.020(1)(a)(b, iii) does not require that the threatener know or intend that the threat will be communicated to the person threatened. *State v. J.M.*, 144 Wn.2d 472, 476-77, 28 P.3d 720 (2001). “[T]he defendant must subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat of intent to cause bodily injury to the person threatened or to another person.” 144 Wn.2d at 481. Whether or not the defendant actually intends to carry out the threat is irrelevant. 144 Wn.2d 481-82. Further, the knowingly element does not extend to the reasonable

fear element. *Id.* at 484. The reasonable fear element stands alone regardless of whether the defendant knows that the threat was received by the victim. 144 Wn.2d at 487. Finally, “the person to whom the perpetrator communicates the threat may be someone other than the person threatened.” 144 Wn. 2d at 488.

In *Trey M.*, *supra*, the Supreme Court considered a sufficiency challenge to the reasonable fear element of the harassment statute. The defendant had a “hit list” of other students. 186 Wn.2d at 890. The Court noted that “each boy testified that when he heard that he was on Trey’s “hit list,” he was “scared.”” *Id.* at 905. The court tersely noted that “That is sufficient.” *Id.* But it remained to be decided whether or not that fear was reasonable. That question was “for the trier of fact in light of the total context.” 186 Wn.2d at 906.

On the reasonableness issue, the *Trey M.* Court addressed an issue asserted by Skald here. Skald argues that the record in the present case does not clearly show that Ms. Gunnlaugsdottir received the actual threats that Skald made. Brief at 19-20. In the case, Trey complained that none of the victims had heard the threat either directly or indirectly. 186 Wn.2d at 906. The Court brushed this argument aside noting that “neither direct communication nor conveyance of Trey's exact words was required.” *Id.* All that is required is that “the person threatened *must find out about* the

threat although the perpetrator need not know nor should know that the threat will be communicated to the victim.” *Id.* (italics by the court); *citing State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001).

An objective test is applied to the issue of the fear element. The reasonableness of the person's fear depends on all the facts and circumstances. *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003). Moreover, “[a] considerable distance or some kind of physical barrier separating the antagonists does not mean the evidence is insufficient when the speaker threatens future harm.” *State v. Dominguez*, 199 Wn. App. 1012 (2017) (UNPUBLISHED AND UNBINDING), *citing State v. Alvarez*, 74 Wn. App. 250, 262, 872 P.2d 1123 (1994), *aff'd*, 128 Wn.2d 1, 904 P.2d 754 (1995). Similarly, Ms. Gunnlaugsdottir’s absence in Iceland should not insulate Skald from his threats of future harm.

The crux of the matter is that these principles must be viewed in light of the particular context and circumstances of the present case. Factual scenarios from other case, unless directly the same, will be somewhat unhelpful on this issue. Here, echoing the argument above, Ms. Gunnalugsdottir knew the circumstances of this case. She knew that she in fact had functionally taken Skald’s children away from him. She was tired of his controlling nature. It is completely reasonable for her to expect that controlling nature would compel Skald to want to eliminate her

so that he might regain control of his children. Moreover, it is a completely reasonable inference on this record that Ms. Gunnlaugsdottir would know that Skald was angry about the divorce and child custody case. Under these circumstances, it would not be unreasonable for her to expect Skald to become antagonistic and perhaps violent about the situation. Her fear of Skald's threat was reasonable.

IV. CONCLUSION

For the foregoing reasons, Skald's conviction and sentence should be affirmed.

DATED November 21, 2017.

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