

No. 50291-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SAMUEL JAMES MCHERRON, JR.,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-02582-1
The Honorable K.A. Van Doorninck, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE	2
	A. PROCEDURAL HISTORY.....	2
	B. SUBSTANTIVE FACTS	3
IV.	ARGUMENT & AUTHORITIES	6
V.	CONCLUSION	9

TABLE OF AUTHORITIES

CASES

<i>City of Tacoma v. Luvene</i> , 118 Wn.2d 826, 827 P.2d 1374 (1992).....	6
<i>State v. Alvarez</i> , 74 Wn. App. 250, 872 P.2d 1123 (1994).....	8
<i>State v. C.G.</i> , 150 Wn.2d 604, 80 P.3d 594 (2003)	8
<i>State v. Hardesty</i> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	9
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	9
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	7

OTHER AUTHORITIES

RCW 9A.46.020	7, 8
---------------------	------

I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt every element of the crime of felony harassment.
2. The State failed to prove beyond a reasonable doubt that Samuel McHerron's spoken threat placed Deputy Derrick Nielsen in reasonable fear that the threat would be carried out.
3. The State failed to prove beyond a reasonable doubt that a reasonable criminal justice participant would have feared that Samuel McHerron's spoken threat would be carried out.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Deputy Derrick Nielsen's fear that Samuel McHerron would "kick his ass" was reasonable, where Samuel McHerron made the threat in broad daylight at a busy public location, Deputy Nielsen is a highly trained police officer who had a firearm and several non-lethal means of control at his disposal, and Samuel McHerron was unarmed?
(Assignment of Error 1 & 2)
2. Would a reasonable criminal justice participant have feared that Samuel McHerron would carry out his spoken threat to

“kick” Deputy Derrick Nielsen’s “ass,” where the incident occurred in broad daylight at a busy public location, Deputy Nielsen is a highly trained police officer who had a firearm and several non-lethal means of control at his disposal, and Samuel McHerron was unarmed? (Assignment of Error 1 & 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Samuel J. McHerron, Jr. with one count of felony harassment (RCW 9A.46.020), one count of fourth degree assault with a domestic violence allegation (RCW 9A.36.041, RCW 10.99.020), and one count of resisting arrest (RCW 9A.76.040). (CP 3-4) A jury convicted Samuel as charged.¹ (CP 66-69; 01/24/17 RP 319-20)² The trial court imposed a standard range sentence of 51 months for the felony harassment conviction, to run concurrent with sentences imposed for the two misdemeanor convictions. (CP 74, 77, 84-85; 01/27/17 RP 6) The trial court imposed only mandatory legal financial obligations. (CP 75;

¹ For the sake of clarity, Samuel McHerron and his wife Kristina McHerron will both be referred to by their first names throughout this brief.

² The transcripts will be referred to by the date of the proceeding contained therein.

01/27/16 RP 6) McHerron timely appeals. (CP 93)

B. SUBSTANTIVE FACTS

Pierce County Deputy Sheriff Derrick Nielsen, who also works as a transit police officer, was on duty the afternoon of June 22, 2016. (01/19/17 RP 115-16; 01/23/17 RP 171-72) That afternoon, he drove his marked patrol car into the parking lot of the 72nd Street transit center. (01/23/17 RP 172-73) The windows were rolled down, and Nielsen heard a female voice screaming, "Help me. Help me. He's hitting me. Get away from me." (01/23/17 RP 174)

Nielsen exited his vehicle and saw two people, whom he later identified as Samuel McHerron and Kristina McHerron, scuffling. (01/23/17 RP 175, 181) He saw Samuel grab Kristina's arm and pull on her. (01/23/17 RP 175) Kristina tried unsuccessfully to pull away. (01/23/17 RP 182)

Nielsen, who was in full uniform, approached and identified himself as a law enforcement officer. (01/23/17 RP 172, 186) He told Samuel and Kristina to back away from each other, and ordered Samuel to sit on a nearby curb. (01/23/17 RP 186) Nielsen testified that Samuel yelled, "fuck off," and "what are you going to do, shoot me?" (01/23/17 RP 186)

Nielsen stepped between Kristina and Samuel, and again asked Samuel to sit on the curb. (01/23/17 RP 186, 188) Nielsen called for backup and continued to try to calm the situation. (01/23/17 RP 188) Samuel continued to yell and attempted several times to approach Kristina. (01/23/17 RP 188) Nielsen pushed Samuel away, which made Samuel more agitated. (01/23/17 RP 189) According to Nielsen, Samuel told him to “get the fuck out of there” and that he would “kick [Nielsen’s] ass.” (01/23/17 RP 189)

Nielsen testified that Samuel took off his backpack and shirt, and assumed a fighting stance and balled up his fists. (01/23/17 RP190) Nielsen feared Samuel might try to assault him or Kristina, so he un-holstered his “electronic control weapon,” commonly known as a taser. (01/23/17 RP 191, 192, 193) From about 10 feet away, Nielsen deployed the taser against Samuel by shooting two darts attached to wires towards Samuel. (01/23/17 RP 193-94) The darts attached to Samuel’s back and delivered a five-second long electronic shock. (01/23/17 RP 193-95)

The taser did not appear to effect Samuel, and he turned and said, “is that all you fucking got?” (01/23/17 RP 196-97) Nielsen dropped the taser and rushed at Samuel, grabbed him around his neck, and took him to the ground. (01/23/17 RP 197)

Other officers arrived to assist, and after struggling with Samuel for 15 to 20 seconds, the officers were able to get control of Samuel and place him into handcuffs. (01/19/17 RP 145-46, 154, 01/23/17 RP 199, 200)

Deputy Walt Robinson contacted Kristina. (01/19/17 RP 118) She was crying and seemed frightened, and her makeup, hair and clothing were disheveled. (01/19/17 RP 119-20; 01/23/17 RP 184) Kristina told Robinson that she and Samuel had been arguing, and that he grabbed her arm and threw water in her face. (01/19/17 RP 123-24)

Samuel testified that he and Kristina married in November of 2009. (01/23/17 RP 265) He was annoyed at Kristina that afternoon because she had disappeared into a fast food restaurant bathroom for 1.25 hours, but he needed to catch a bus so that he could go to an appointment he had that afternoon. (01/23/17 RP 251, 252) They argued as they walked towards the transit center, and Kristina said she did not want to go with Samuel. (01/23/17 RP 252, 253) Samuel said that was fine, and asked Kristina to give him his dog, who Kristina was carrying in her arms. (01/23/17 RP 253)

Samuel reached to take the dog from Kristina. (01/23/17 RP

253, 268) At that moment Kristina saw Deputy Nielsen's patrol car pull into the parking lot, and she started yelling, "Officer, Officer, he hit me." (01/23/17 RP 254) He stepped away from Kristina, and started walking towards the bus. (01/23/17 RP 255-56)

Samuel testified that Deputy Nielsen confronted him and told him to sit on the curb. (01/23/17 RP 256) Samuel refused because he had not done anything wrong, but Nielsen jumped in front of him and would not let him walk to the bus. (01/23/17 RP 256-57) Then Nielsen shoved Samuel, grabbed him from behind the back of his neck, and took him to the ground. (01/23/17 RP 257) Nielsen would not let him go, and Samuel eventually lost consciousness. (01/23/17 RP 258-59)

Samuel denied saying the things that Nielsen claimed he said. (01/23/17 RP 257) Samuel testified that he actually told Nielsen that he did not want to fight. (01/23/17 RP 258)

IV. ARGUMENT & AUTHORITIES

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to

support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

RCW 9A.46.020(1) provides in relevant part that a person is guilty of harassment if:

- (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . .
 - and
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

The State charged Samuel with felony harassment of a criminal justice participant, which required the state to prove that Samuel harassed “a criminal justice participant who is performing his or her official duties at the time the threat is made[.]” RCW 9A.46.020(2)(b)(iii). (CP 3, 53)

The “reasonable fear” requirement contains both a subjective and objective component.

Assuming the evidence establishes the victim's subjective fear, the issue is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt, using an objective standard, that the victim's fear in each case was reasonable. This is an important limiting element in the statute, requiring the trier of fact to consider the defendant's conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions.

State v. Alvarez, 74 Wn. App. 250, 260-61, 872 P.2d 1123 (1994), *aff'd*, 128 Wn.2d 1, 904 P.2d 754 (1995) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

This objective standard is also included in the language of the harassment statute:

For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening 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). The State must also prove that the victim was placed in reasonable fear of the actual threat made. *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003).

In this case, Deputy Nielsen testified that he was concerned that Samuel might assault him. (01/23/17 RP 191) But his subjective concern was not objectively reasonable. Nor was it

apparent that Samuel had the present and future ability to carry out his threat to “kick [Nielsen’s] ass.” No objective juror, and no reasonable criminal justice participant, would have believed that a shirtless and unarmed civilian could successfully assault, in broad daylight at a busy transit station, a highly trained police officer and former Marine who was armed with a firearm, pepper spray and a taser. (01/23/17 RP 170, 172, 174, 187, 190, 237) Deputy Nielsen’s fear that Samuel could carry out his threat was not reasonable under the circumstances.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Because the State failed to prove that Deputy Nielsen had a “reasonable fear” that Samuel’s threat would be carried out, there was insufficient evidence to prove the felony harassment charge and this conviction must be reversed and dismissed.

V. CONCLUSION

No reasonable trier of fact could have found, beyond a reasonable doubt, that Deputy Nielsen reasonably feared that

Samuel could carry out his verbal threat. Samuel McHerron's felony harassment conviction should be reversed and dismissed, and his case remanded for resentencing on the misdemeanor convictions only.

DATED: June 28, 2017



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Samuel J. McHerron, Jr.

CERTIFICATE OF MAILING

I certify that on 06/28/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Samuel J. McHerron, Jr., DOC# 710097, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

June 28, 2017 - 2:57 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50291-7
Appellate Court Case Title: State of Washington, Respondent v. Samuel J. McHerron, Jr., Appellant
Superior Court Case Number: 16-1-02582-1

The following documents have been uploaded:

- 7-502917_Briefs_20170628145203D2850682_2422.pdf
This File Contains:
Briefs - Appellants
The Original File Name was McHerron Brief.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Sender Name: Stephanie Cunningham - Email: sccattorney@yahoo.com
Address:
4616 25TH AVE NE # 552
SEATTLE, WA, 98105-4183
Phone: 206-526-5001

Note: The Filing Id is 20170628145203D2850682