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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
#50935-1-II

STATE OF WASHINGTON

Respondent

vs.

SPENCER J. FREDRICKSEN

Appellant

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
The Honorable Bernard F. Veljacic
Superior Court No. 16-1-00279-0

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I. ASSIGNMENT OF ERROR

- A. Appellant assigns error to the trial court's verdict on Count 01 - - Harassment - - Death Threat.**

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- 1. Whether the evidence is sufficient to establish that Mr. Fredricksen's statements constituted a "true threat" to *kill* Magno.**

- 2. Whether the evidence is sufficient to establish that Magno reasonably feared that he would be *killed* in order to sustain the verdict of the trial court.**

III. STATEMENT OF THE CASE

A. Procedural History

Spencer Fredricksen, Appellant herein, was charged by an information filed February 4, 2016, with felony death threat harassment in violation of RCW 9A.46.020(2)(b)/ 9A.46.020 (2)(b)(ii), with a firearm enhancement per RCW 9.94A.825 and 9.94A.533(3), and attempted assault in the second degree per RCW 9A.36.021(1)(c)/9A.28.020(3)(c), with a firearm enhancement per RCW 9.94A.825 and RCW 9.94A.533(3). CP 8.

The defense filed a motion to dismiss the attempted second degree assault charge on September 12, 2016, and filed a motion to dismiss the felony harassment charge on September 16, 2016. The Court heard argument on the motions on November 28, 2016. The motion to dismiss the attempted second degree assault charge was granted. The motion to dismiss the felony harassment charge was denied. The Court's order dismissing the attempted second degree assault charge was filed January 10, 2017. CP 55.

The State file an amended information August 24, 2017, deleting the attempted second degree assault charge which the Court had previously dismissed. CP 79.

Mr. Fredricksen waived jury and the case was tried to the bench on August 28, 2017. At the close of the State's case, the defense moved to dismiss the felony harassment charge. RP I 105. The motion was denied. RP I 109. At the conclusion of the case the defense moved to dismiss the firearm enhancement, RP II 187, and the felony harassment charge. RP II 195. The Court denied the motions. RP II 198. The Court found Mr. Fredricksen guilty of felony harassment, but did not find that he was armed with a firearm at the time that the felony was committed. RP II 238-239. **The Court did not enter findings of fact or conclusions of law.**

On September 20, 2017, the Court sentenced Mr. Fredricksen to 30 days' confinement, converted to work crew. CP 103. The Court stayed imposition of sentence pending appeal. Mr. Fredricksen filed a timely notice of appeal. CP 103.

B. Trial testimony

Reis Scribner-Magno testified he was residing in apartment 291 of the Ellsworth Apartments with his friend Christina Svidersky on February 1, 2016. RP I 19. Although they had previously dated, they were no longer romantically involved. RP I 19-20. Mr. Magno and Ms. Svidersky had been friends with Spencer Fredricksen for many years. Magno and Fredricksen over the years had played sports, video games, and socialized frequently. RP I 37, 114. There had never been any animosity or physical conflict between them. RP I 37.

On the evening of February 1, 2016, Mr. Fredricksen and Svidersky went out for drinks. When they returned to her apartment Magno was watching TV. The three of them had a drink. Svidersky was really intoxicated. She kind of passed out and started falling off her chair. RP I 21. Magno picked her up and laid her on the couch. He went outside on the balcony to

smoke a cigarette. While outside he saw Fredricksen and Svidersky kissing. Magno confronted Fredricksen. They went outside on the balcony to talk. Magno was mad at Fredricksen. A physical altercation ensued. Fredricksen ended up with a bloody face. Magno grabbed him and pushed him out the door. RP I 38-39.

Fredricksen then called Magno on his cell at 11:04 p.m. He was very apologetic about the whole situation. He asked Magno to come outside. RP I 30. Magno was mad. He said no and hung up. RP I 39-40. Three minutes later at 11:07 p.m., Fredricksen called Magno back. He was screaming about something. He said he was going to go get his gun and Magno hung up on him again. RP I 29-40. Fredricksen did not threaten to shoot Magno. He did not threaten to kill Magno. He did not say he was going to come after Magno with the gun. RP I 41-42. After the second phone call Magno testified he was worried Fredricksen could have shot the door or shot him. RP I 34. That's why he called 911. RP I 34. When he called 911 Magno opened his door to see if he could see Fredricksen but did not see him anywhere. RP I 103. He peeked out his door a second time and saw Bibens taking Fredricksen into custody. RP I 63. Magno confirmed there had never been any

animosity or physical conflict between him and Fredricksen before that night. RP I 37.

Svidersky testified she and Magno used to date, and were living together as roommates on February 1, 2016 in the Ellsworth Apartment. RP I 46. She and Fredricksen were also friends. He picked her up on the evening of February 1 and they went out for drinks. The next thing she remembered was Magno telling her about everything that happened while she was blacked out. RP I 49.

Officer Therman Bibens testified he was called out a little after 11 p.m. on February 1 to respond to the Ellsworth Apartment. His information was Magno had called 911 reporting he had just gotten in a fight with one of his friends who said he was going to get his gun. RP I 52. Several other officers also responded. Bibens ascended the stairs toward Magno's apartment on the third floor. He saw Fredricksen in the shadows about four feet to the left of Magno's apartment door. Fredricksen immediately put his hands up and identified himself. He also volunteered that he had a gun on him. Bibens ordered him onto his knees. A loaded pistol was found in his back right pocket. He was placed into custody. RP I 53-55. Fredricksen was forthcoming and cooperative. He had blood on his face. RP I 85.

While Bibens was taking Fredricksen into custody, Magno peeked out his apartment door. RP I 63. Bibens then contacted Magno. He was calm but nervous. RP I 60. The defense interposed a hearsay objection to statements made by Magno to Bibens. RP I 60. The State contended Magno's statements to Bibens qualified as excited utterances and/or prior inconsistent statements. The Court pointed out that impeachment is not substantive evidence, and allowed the State to make an offer of proof to lay foundation for the excited utterance exception to the hearsay rule. RP I 60-62.

In response to further questioning Bibens repeated that Magno was "calm and cooperative but nervous and scary." He related that Magno told him, in addition to Fredricksen saying he was going to go get his gun, that Fredricksen also invited him to come outside and fight, and stated "I'm coming for you" during the second phone conversation. RP I 64-65.

Bibens reiterated that Magno was calm and cooperative, but was "real jittery - - kind'a nervous." RP I 78-79. The Court ruled it was a "difficult call", but determined that Magno was "still under some excitement from a startling fear invoking event and that the statements made by Magno to Bibens qualified for admission under the excited utterance exception to the hearsay rule.

Specifically, **the Court admitted statements attributed by Magno to Fredricksen** “come outside and fight me,” and “I’m coming for you.” RP I 80-81.

Bibens *Mirandized* Fredricksen. He waived his *Miranda* rights and answered Bibens’ questions. He said he and Svidersky had gone out for drinks and came back to the apartment. He reported that she passed out, and that he and Magno went out on the balcony and ended up getting in an argument after he was seen kissing Svidersky. He said he was cornered by Magno and Magno began to punch him in the face. When Bibens asked him why he thought he had to go get his gun from the car he said he needed to protect Svidersky from Magno. He then began to cry and said “I will go to prison for that girl.” RP I 68-70.

On cross-examination Bibens acknowledged that Magno had sworn out a handwritten statement of facts. The statement was admitted into evidence as D-31. RP I 89; Appendix A. In the statement Magno wrote that Fredricksen: “(C)alled me and said has a gun and for me to come outside.” **Unlike the “excited utterance” attributed to Magno by Bibens**, in his written statement Magno did not claim that Fredricksen asked him to come outside to fight him nor did he claim that Fredricksen said that he was coming for him. Appendix A. Bibens acknowledged on

cross-examination that Magno never claimed Fredricksen threatened to shoot him, and never threatened to kill him. RP I 92-93.

The State then offered Magno's 911 call recording, which appears at RP I 97-105. During the call Magno reports to dispatch "he just called me and saying that he's outside and grabbing his gun out of his car." RP I 98. Magno goes on to state at RP I 101: "As soon as he said he had a gun I hung up the phone and I called you guys." While on the phone with dispatch Magno reported that he had looked out his front door and couldn't see Fredricksen. RP I 103. **Again, unlike the hearsay**, Magno did not claim during the 911 call that Fredricksen said "come outside and fight me", or "I'm coming for you", or anything like that. RP I 97-105.

After the State rested, the defense called Mr. Fredricksen. He acknowledged that he, Magno, and Svidersky had been friends for a long time. He testified he and Svidersky went out to the Margarita Factory on the evening of February 1, 2016. While they were out she complained to him that Magno would get overly aggressive towards her. RP I 123-124. They eventually returned to the apartment and started drinking again. Magno went out and got a six pack of beer and cigarettes. When he returned he drank a beer and they shared shots. Svidersky passed out. He and Magno

continued drinking. Svidersky woke up. Magno and Fredricksen arm wrestled playfully. Svidersky went to the couch to lie down. Magno went out on the balcony to smoke. Fredricksen laid on the couch next to Svidersky. They both started kissing each other. Magno came back in. He was mad. Fredricksen jumped up and apologized. RP I 134. Magno told Fredricksen he had to leave. Then he said "I'm going to punch you," balled up his fists and came towards Fredricksen. As Fredricksen was about to leave Magno invited him out on the balcony saying everything was fine. Svidersky came out too. Magno started balling his fists up again and came at Fredricksen. As he did so he shoved Svidersky. She fell down. Fredricksen told Magno "you don't have to push her". As he went to help Svidersky up his left hand brushed Magno's right shoulder and Magno punched him twice. He punctured a hole in Fredricksen's cheek. It began bleeding. Fredricksen grabbed ahold of Magno and they wrestled to the ground. Svidersky broke them up. Fredricksen ran to the door and exited. RP I 135-138.

After leaving the apartment Fredricksen tried to call five or six friends for help. He wanted to get help to get Svidersky out of the apartment. RP I 139. While still at the bottom of the stairs he got ahold of Allen Utterback. He told Utterback he'd just got beaten up and needed help. He wanted help getting Svidersky out

of the apartment for her safety. Utterback said he could not help. Fredricksen called Svidersky but she didn't answer. Then he called Magno. He apologized for the kiss he and Svidersky had shared. He told Magno he was "scared for Svidersky's safety and that she needs to come downstairs because of Magno's violent temper." Magno replied "she was fine and if you're still downstairs [I'm] going to come down and kick your ass." Then he hung up. So Fredricksen called him back. He told Magno "she's not safe - she needs to come downstairs." Magno repeated that "she's fine and if you're still down there I'm going to come down and kick your ass." At that point Fredricksen said "I'm not going to get beat up again - - I'm going to go to my car and get my gun." Magno hung up again. RP I 140-142.

Mr. Fredricksen then walked from the bottom of the stairwell to his car which was about a three minute walk away. He retrieved his gun. He had a concealed carry permit. He put the gun in his right back pocket. Then he walked back toward the apartment to see if he could listen at the door to hear if anything was going on. RP I 146-147. Halfway up the stairs he called 911 but hung up before they answered. He was worried Magno might hear him through the door and escalate the situation. RP I 148. Once he got up to the landing on the third floor he overheard

Magno and Svidersky but could not make out what they were saying. RP I 148. While he was there on the landing Magno opened the door twice. The first time he said, “no I don’t see anybody” and shut it. Twenty or thirty seconds later Magno repeated the behavior. Maybe four or five minutes later Officer Bibens came up the stairs. RP I 148-149. The gun was still in Fredricksen’s back pocket. He cooperated as he was taken into custody.

Fredricksen testified he did not threaten Magno. He did not threaten to shoot him. He did not threaten to kill him. He never said “I’m coming for you.” The only reason he got his gun is he had just been beaten up **by Magno** and was concerned for Svidersky’s safety. RP I 151.

Utterback testified he was friends with Fredricksen, Magno, and Svidersky. He received a call from Fredricksen late in the evening on February 1, 2016. He was getting ready for bed. Fredricksen sounded kind of panicked and worried - - concerned - - something had just happened. He reported he was worried for Christina’s safety and wanted Utterback to come help him escort her away from the situation. He told Utterback that Magno had hit him and pushed her down. Utterback’s car wasn’t running at the

moment so he did not comply with Fredricksen's request. RP I 170-172. The defense rested.

IV. ARGUMENT AND AUTHORITIES

A. Introduction

Due process requires that the State prove each element of the crime charged beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984). In a felony harassment case the State is required to prove beyond a reasonable doubt that there was a death threat. RCW 9A.46.020(2)(b).

In order to avoid infringing on the freedom of speech protected by the First Amendment, only "true threats" are prohibited. *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). A "true threat" in a felony harassment case is a statement made in a context or under such circumstances that a reasonable person would foresee that it would be interpreted as an expression of an intention to cause death. *Id.*, at 40.

The plain meaning of the statute requires that the fear of "the threat" must be fear of the actual threat made. In a felony harassment case that means the threat of death, rather than mere bodily injury. *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003).

B. Mr. Fredricksen’s statements did not constitute a threat, and therefore did not constitute a “true threat” to kill Magno.

1. Standard of Review

Ordinarily, in reviewing the sufficiency of evidence to support a criminal conviction, an appellate court is required to determine whether the evidence in the record could reasonably support a finding of guilt beyond a reasonable doubt. *State v. Kohonen*, 192 Wn.App. 567, 573, 370 P.3d 16 (2016). The relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* The purpose of this standard is to ensure that the trial court rationally applied the constitutional requirements of the due process clause, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt. *Id.*, at 574.

However, because RCW 9A.46.020 curtails speech, our courts have subjected alleged threats to constitutional scrutiny. As stated by the court in *State v. Kilburn, supra* at 49:

An appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat in order to avoid infringement on the precious right of free speech. It is not enough to engage in the usual

process of assessing whether there is sufficient evidence in the record to support the trial court's findings. The First Amendment demands more.

As a result, our appellate courts are required to independently review the record to determine whether an alleged threat was in fact a "true threat," and therefore unprotected speech. As stated by the court in *Kilburn, supra* at 52:

Here, we apply the rule of independent review because the sufficiency of the evidence question raised involves the essential First Amendment question—whether Kilburn's statements constituted a "true threat" and therefore unprotected speech. We must independently review the crucial facts within the record, i.e., those which bear on the constitutional question.

2. The statement "I'm going to get my gun" was not a threat, and certainly not a threat to kill.

In order for the evidence to establish a "true threat", a statement must actually be a threat. In order to constitute a threat under Washington law: "(T)he threat must be 'malicious,' which means 'an evil intent, wish, or design to vex, annoy, or injure another person.'" RCW 9A.04.110 (12); *State v. Williams*, 98 Wn.App. 765, 770-771, 991 P.2d 107 (2000). Statements made in jest, idle talk, political comment, etc., are distinguished from "true threats." *State v. Kohonen, supra* at 576; *State v. Kilburn, supra*.

Whether a statement is a “true threat”, a joke, or something else is determined in light of the entire context in which the statement is made. *State v. C.G.*, *supra*, at 611. A person can indirectly threaten to harm or kill another. *State v. Kohonen*, *supra*, at 576-577. The test is whether the statement was made in a context or under such circumstances that a reasonable person would foresee the statement would be interpreted as a serious expression of intention to inflict bodily harm or death. *State v. Trey M.*, 186 Wn.2d 884, 894, 383 P.3d 474 (2016); *State v. Kilburn*, *supra*, at 43.

The First Amendment issue has usually been addressed in cases where the court has been asked to determine whether the statements at issue constituted a serious threat, or a joke. For example, in *State v. Kilburn*, *supra*, the juvenile defendant was convicted of felony harassment for stating out loud to a schoolmate: “I’m going to bring a gun to school tomorrow and shoot everyone and start with you” and, “maybe not you first.” The Court of Appeals affirmed. The Supreme Court held that the evidence was insufficient to support the finding that the juvenile’s statement constituted a “true threat,” because, after independent review of the record, the court determined that the defendant was

joking. In other words, because the defendant was joking, the threat to kill was not a threat at all.

Similarly, in this case, the statement “I’m going to get my gun” was not a threat, and therefore not a “true threat” to kill. Mr. Fredricksen had a concealed weapons permit, and a constitutional right under the Second Amendment to carry a gun. Informing someone that you’re going to exercise your Second Amendment right to arm yourself for self-protection, or to protect another, is protected speech.¹

In this case, there was uncontroverted testimony that Magno was angry, had assaulted Svidersky, beaten up Fredricksen, and that Fredricksen was concerned for Svidersky’s safety. RP I 29, 36-37, 39, 136, 137, 139-140. Thus, the statement “I’m going to get my gun,” in the context of this case, was not a threat, but protected speech under the First Amendment giving notice of intent to exercise a Second Amendment right.

3. The overwhelming evidence in the record is that Fredricksen never made the statement “come outside and fight me”.

¹ Statements constitute protected speech under the First Amendment whether they are a joke, a warning, or anything else not prohibited by statute.

Although Officer Bibens testified that Magno told him Fredricksen made the statement “come outside and fight me” during the second phone call, RP I 65, the overwhelming evidence is to the contrary.

First, Magno testified under oath at trial that during the first phone call Fredricksen was apologetic and calm, and simply asked Magno to come outside. RP I 29-30. Magno hung up on him. He testified “I was so mad and I told him just not to call me anymore.” RP I 29. Obviously, if Fredricksen was apologetic and calm during the first phone call, he certainly would not have made a statement like “come outside and fight me.”

Second, Magno told the 911 dispatcher, “he just called me and saying that he’s outside and grabbing his gun out of his car.” RP I 98. He never claimed during the 911 call that Fredricksen said “come outside and fight me.”

Third, Magno never claimed in his handwritten and signed Sworn Statement of Facts that Fredricksen made the statement “come outside and fight me.” Instead, he wrote that Fredricksen “called me and said he has a gun and for me to come outside.” RP I 89; Appendix A.

According to Bibens, Magno told him Fredricksen invited him to come outside and fight during the *second* phone call. RP I

65. But, that is irreconcilable with Magno's sworn trial testimony that Fredricksen was calm and apologetic when he asked him to come outside, and that was during the *first* phone call. RP I 30.

Given Magno's trial testimony, his Sworn Statement of Facts, and the information he provided to 9-1-1 dispatch, the overwhelming weight of the evidence is that Fredricksen never invited Magno to come outside *to fight*.

4. The statement "come outside and fight me" is not a threat, and certainly not a threat to kill.

Assuming Fredricksen did say "come outside and fight me", it did not constitute a threat, and certainly not a threat to kill. At best the statement constitutes an invitation and is not prohibited by RCW 9A.46.020(2)(b).

5. The overwhelming evidence in the record is that Fredricksen never made the statement "I'm coming for you".

Crucial to the trial court's verdict was its ruling that Fredricksen also told Magno "I'm coming for you" in the second phone call. RP II 234. Although Bibens testified Magno told him Fredricksen made that statement, the overwhelming weight of the evidence is to the contrary.

First, in his sworn trial testimony Magno explicitly denied that Fredricksen ever made any such statement. Magno testified during the second phone call Fredricksen said he was going to go get his gun, and Magno hung up. RP I 29-30. Magno further testified specifically that Fredricksen did *not* say he was going to come after him with the gun. RP I 41-42.

Second, during Magno's 9-1-1 dispatch call, Magno reported to dispatch, "he just called me and saying that he's outside and grabbing his gun out of his car." RP I 98. Magno went on to say at RP I 101: "As soon as he said he had a gun, I hung up the phone and I called you guys." Magno did not claim during the 9-1-1 call that Fredricksen said, "I'm coming for you" or anything like that. RP I 97-105. In fact, Magno repeated three times during the 9-1-1 call that all Fredricksen said was that he was grabbing his gun (out of his car). RP I 98, 101.

Third, Magno did not claim Fredricksen said "I'm coming for you" in his Sworn Statement of Facts. In the statement Magno wrote that Fredricksen said "he has a gun and for me to come outside", but did not claim that Fredricksen said he was coming for him. RP I 89; Appendix A.

Fourth, Fredricksen testified that he never said "I'm coming for you." RP I 151.

6. There was no threat, and no threat to kill.

In order to constitute a threat under Washington law: “(T)he threat must be ‘malicious’ which means ‘an evil intent, wish, or design to vex, annoy, or injure another person.’” RCW 9A.04.110 (12); *State v. Williams, supra*, at 770-71. Looking at the language Fredricksen used, he did not threaten to shoot Magno. He did not threaten to kill Magno. Even assuming Fredricksen made the statement “I’m coming for you”, the evidence is insufficient to establish malice or a threat to kill Magno. Given Fredricksen’s uncontradicted testimony that he got his gun for self-protection and out of concern for Svidersky’s safety, the entire statement “I’m going to get my gun out of my car and I ‘m coming for you”, can reasonably be interpreted as fair notice that he was prepared and capable of defending himself and Svidersky if necessary, and therefore protected speech. This is reinforced by the fact that although Fredricksen armed himself, he did not make any effort to contact Magno or otherwise use the gun. As the trial court acknowledged in its ruling, at RP I 235: “I don’t think there’s an assaultive issue here. The door opened a couple of times. I think - - you know - - Mr. Fredricksen - - if he would want to shot [sic] him he would have taken that opportunity.” Instead,

all Fredricksen actually did was eavesdrop on Magno's apartment to monitor Svidersky's safety. RP I 148-149.

7. In light of the history of their relationship, and the entire context, the overwhelming evidence in the record is that Fredricksen would not have foreseen that Magno could reasonably interpret his statements as a threat to kill.

Even assuming that Fredricksen actually stated "I'm coming for you", the record contains substantial doubt that Fredricksen could have expected Magno to reasonably believe the statement constituted a threat to kill. This is because:

- They had been friends for five, six, or seven years according to Magno. RP I 20.
- According to Fredricksen they had been friends since 2004 and played sports, video games, and otherwise socialized frequently. RP I 37, 114.
- There had never been any animosity or physical conflict between Magno and Fredricksen. RP I 37.
- Magno testified Fredricksen is not a violent person. RP I 41.
- Magno testified he has never known Fredricksen to hurt anyone. RP I 41.
- Magno testified Fredricksen did not threaten to shoot him. RP I 40.
- Magno testified Fredricksen did not threaten to kill him. RP I 40.

C. The evidence in the record is insufficient to establish that Magno reasonably feared that he would be killed.

1. Standard of review.

In *State v. C.G., supra*, where the Court addressed the sufficiency of proof that the alleged victim was placed in reasonable fear that a threat to kill would be carried out, the Court reviewed the record *de novo*. *Id.*, at 608. Because that is exactly the issue in this case, the Court may independently review the record to determine whether Magno was placed in reasonable fear that the alleged threat to kill would be carried out.

2. The evidence does not establish that Magno was placed in reasonable fear that he would be killed.

Assuming that Fredricksen's statements can be construed as a threat, there was no threat to kill. Whatever the threat, whether listed in RCW 9A.46.020(1)(a) or (2)(b), the State must prove that the victim was placed in reasonable fear that the same threat, i.e., *the* threat, would be carried out. *State v. C.G., supra*, at 609.

In *State v. C.G., supra*, a high school student became angry and disruptive in class. As she was removed from the classroom by the vice principal Mr. Haney, she made the statement, "I'll kill

you Mr. Haney, I'll kill you.” She subsequently threatened to kill a police officer who responded. At the adjudicatory hearing Haney testified that C.G.’s threat caused him concern and that based on what he knew about her she might try to harm him or someone else in the future. C. G. was convicted of both counts, but only appealed the count naming Mr. Haney as a victim. The Court of Appeals affirmed, and the Supreme Court granted review.

The Supreme Court found the evidence insufficient to sustain the felony death threat conviction because in the case of a threat to *kill*, the victim must be placed in reasonable fear that a threat to *kill* will be carried out. *Id.*, at 610. As stated by the Court, at 610:

Under the plain reading of the statute, C. G.’s conviction for felony harassment must be reversed because there is no evidence that Mr. Haney was placed in reasonable fear that she would kill him.

In reaching its decision, the Court concluded that the nature of a threat depends on all the facts and circumstances, in addition to the statement itself. *Id.*, at 611. Thus, in the case at bench, it is appropriate to examine (1) what Fredricksen actually said, (2) Magno’s testimony as to how he perceived the statement, and (3) Magno’s behavior after the statement was made.

First, Fredricksen's statement was ambiguous. Even the trial court described it as a "vague reference." RP II 237.

Although the Court concluded that Fredricksen's statement was made to put fear of harm via a threat into Magno's mind, the statement is equally consistent with Fredricksen's avowed purpose of protecting himself and Svidersky.

Second, Magno did not testify he thought Fredricksen would try to kill him. RP I 34

Third, after the second phone call and the alleged threatening statement, Magno's behavior shows he was not actually afraid that he would be either shot or killed because he twice opened the door of his apartment to see if he could locate Fredricksen. RP I 63, 103-104, 150; RP II 235. It has been said that actions speak louder than words, and in this case Magno's actions created reason to doubt that he actually feared being shot, or killed.

V. CONCLUSION

Based upon the foregoing argument and authorities, there was insufficient evidence of a threat to kill and/or that Magno reasonably feared that he would be killed in order to sustain the verdict of the trial court. As a result, this case should be reversed

and remanded with instructions to the trial court to dismiss the
felony harassment charge.

DATED this 7 day of February, 2018.



Steven W. Thayer, WSBA #7449
Attorney for Appellant

APPENDIX A

Page One of _____

SWORN STATEMENT OF FACTS

Date: 2-1-16 Time: 11:45 Persons Present: 360-831-1043

Location: 1221 SE Ellsworth Vancouver, WA 98664 Apt ²²¹

I, Reis Magno, 26 years of age, residing at above address, make the following statement of my own free will and accord. No threats, promises or offers of gratuity or immunity have been made to me, nor was violence used in obtaining this statement of facts.

I swear, under oath, that this statement is true and accurate. I am aware that a false statement by me at this time can result in criminal actions against me to include: perjury (RCW 9A.72.010-150), false swearing (RCW 9A.72.040), false reporting (RCW 9A.84.040), and/or malicious prosecution.

The Police Department of the City of Vancouver, Washington may use this statement and the facts contained therein in any criminal investigation they desire to conduct.

I was at my house when Spencer and Christina came at my house. Me and Spencer got into a physical altercation on my balcony when he grabbed me by the neck and I hit him he then left my house and called me and said he has a gun and for me to come outside I then immediately called 911. When he said he had a gun I got worried. I was scared he might shoot me.

I have read/written the above Statement of Facts and I swear it is true and correct to the best of my knowledge.

Signed: Reis Magno

Witnesses: J. Suarez 1547

Notary Public _____

Date _____

Residing _____

My Commission Expires _____

2016 FEB 26 A 8:23
COMMUNITY DEPARTMENT

2316-1852

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

STATE OF WASHINGTON,)
) Court of Appeals #50935-1-II
 Plaintiff/Respondent,) Clark County No. 16-1-00279-0
)
 vs.) DECLARATION
) OF SERVICE
SPENCER JAMES FREDRICKSEN))
)
 Defendant/Appellant.)
_____)

I declare that on February 7, 2018, a true copy of the Opening Brief of Appellant was sent to the following persons in the manner indicated:

Rachael Rogers Probstfeld (via email)
Deputy Prosecuting Attorney
1013 Franklin Street
Vancouver, WA 98660
rachael.probstfeld@clark.wa.gov

Derek M. Byrne, Court Clerk (via e-filing)
950 Broadway, Suite 300
Tacoma, WA 98402

Spencer James Fredricksen (via US mail)
5813 NE 49th Street
Vancouver, WA 98661

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington this 7th day of February, 2018.



Betty Olesen, Legal Assistant
STEVEN W. THAYER, P.S.
112 W. 11th Street, Suite 200
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STEVEN W. THAYER PS

February 07, 2018 - 10:58 AM

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Appellate Court Case Number: 50935-1
Appellate Court Case Title: State of Washington, Respondent v. Spencer J. Fredricksen, Appellant
Superior Court Case Number: 16-1-00279-0

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