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NO. 50935-1-II

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

STATE OF WASHINGTON, Respondent

v.

SPENCER JAMES FREDRICKSEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00279-0

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR.....	1
I. Sufficient evidence established that Fredricksen’s statements constituted a “true threat” to kill Magno.	1
II. Sufficient evidence established that Magno reasonably feared that Fredricksen would carry out his threat.	1
STATEMENT OF THE CASE.....	1
A. Procedural History	1
B. Statement of Facts	2
ARGUMENT	8
I. Sufficient evidence established that Fredricksen knowingly threatened to kill Magno, that his words or conduct placed Magno in reasonable fear that the threat to kill would be carried out, and that Fredricksen’s threat was a “true threat.”	8
a. <i>Standard of Review</i>	9
b. <i>The Evidence was Sufficient to Convict Fredricksen of Felony Harassment</i>	12
1. Fredricksen threatened Magno and his threat constituted a “true threat.”	12
2. Fredricksen’s threat was a threat to kill.	23
3. Magno reasonably feared that Fredricksen would carry out his threat to kill him.....	25
CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases

<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962)	20
<i>Duc Tan v. Le</i> , 177 Wn.2d 649, 300 P.3d 356 (2013)	12
<i>Harte-Hanks Commc 'ns, Inc. v. Connaughton</i> , 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)	11, 12, 22
<i>State v Locke</i> , 175 Wn.App. 779, 307 P3d 771 (2013)	11, 14, 22, 23
<i>State v. Alvarez</i> , 74 Wn. App. 250, 872 P.2d 1123 (1994), <i>aff'd</i> , 128 Wn.2d 1, 904 P.2d 754 (1995)	26
<i>State v. Barnes</i> 158 Wn.App. 602, 243 P.3d 165 (2010)	15, 17
<i>State v. Burke</i> , 132 Wn.App. 415, 132 P.3d 1095 (2006)	13
<i>State v. C.G.</i> , 150 Wn.2d 604, 80 P.3d 594 (2003)	14, 22, 23, 24, 26
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990)	10, 22
<i>State v. Cross</i> , 156 Wn.App. 568, 234 P.3d 288 (2010)	25
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)	9, 10
<i>State v. Gallagher</i> , 112 Wn.App. 601, 51 P.3d 100 (2002)	9
<i>State v. Hayes</i> , 81 Wn.App. 425, 914 P.2d 788 (1996) <i>rev. denied</i> 130 Wn.2d 1013 (1996)	10, 22
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014)	9, 24
<i>State v. J.M.</i> , 144 Wn.2d 472, 28 P.3d 720 (2001)	13
<i>State v. Johnston</i> , 156 Wn.2d 355, 127 P.3d 707 (2006)	11, 14, 22
<i>State v. Kilburn</i> , 151 Wn.2d 36, 84 P.3d 1215 (2004). 8, 11, 13, 14, 17, 18, 19, 21, 22, 24	
<i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986)	1
<i>State v. Kohonen</i> , 192 Wn.App. 567, 370 P.3d 16 (2016)	11, 14, 22
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991)	20
<i>State v. Manajares</i> , 197 Wn.App. 798, 391 P.3d 530 (2017)	20
<i>State v. McCreven</i> , 170 Wn.App. 444, 284 P.3d 793 (2012)	10
<i>State v. Noltie</i> , 116 Wn.2d 831, 809 P.2d 190 (1991)	10
<i>State v. Pinkney</i> , --- Wn.App. ---, 411 P.3d 406, 410 (2018)	12
<i>State v. Read</i> , 147 Wn.2d 238, 53 P.3d 26 (2002)	28
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	9
<i>State v. Schaler</i> , 169 Wn.2d 274, 236 P.3d 858 (2010)	13, 18
<i>State v. Scherck</i> , 9 Wn. App. 792, 514 P.2d 1393 (1973)	14, 23
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	10
<i>State v. Toscano</i> , 166 Wn.App. 546, 271 P.3d 912 (2012)	12
<i>State v. Trey M.</i> , 186 Wn.2d 884, 383 P.3d 474 (2016)	24, 26, 27, 28
<i>State v. Walton</i> , 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992)	10
<i>State v. Williams</i> , 98 Wn.App. 765, 991 P.2d 107 (2000)	12

State v. Young, 89 Wn.2d 613, 574 P.2d 1171 (1978)..... 20

Statutes

RCW 9A.04.110(12)..... 12

RCW 9A.04.110(28)..... 12, 23

RCW 9A.46.020..... 8, 12

RCW 9A.46.020(1)..... 8

RCW 9A.46.020(1)(a) 13

RCW 9A.46.020(1)(a)(i)..... 16

RCW 9A.46.020(1)(a)(iv)..... 12

RCW 9A.46.020(2)(b)(ii) 8

Rules

GR 14.1(a)..... 16, 25

Unpublished Opinion

State v. Juve, 174 Wn.App. 1031, 2013 WL 1342348, 4-5 16, 17

State v. Lowe, 186 Wn.App. 1014, 2015 WL 914557 at 2..... 26

RESPONSE TO ASSIGNMENTS OF ERROR

- I. Sufficient evidence established that Fredricksen's statements constituted a "true threat" to kill Magno.
- II. Sufficient evidence established that Magno reasonably feared that Fredricksen would carry out his threat.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Spencer James Fredricksen was originally charged by information with Felony Harassment – Death Threats and Attempted Assault in the Second Degree for his actions against Reis Magno on the night of February 1, 2016. CP 1-2. Each count also contained a firearm enhancement. CP 1-2.

Fredricksen filed a *Knapstad* motion seeking to dismiss the case against him. 107 Wn.2d 346, 729 P.2d 48 (1986); CP 3-8. Pursuant to that motion, the trial court dismissed the Attempted Assault in the Second Degree. CP 122-24, 128-29. The State then filed an amended information with just the Felony Harassment count. CP 145-46.

The parties proceeded to a bench trial on August 28, 2017 in front of the Honorable Bernard Veljacic. Following the presentation of the evidence the trial court found Fredricksen guilty of Felony Harassment – Death Threats, but did not find the firearm enhancement. RP 238-39; CP

177, 179-89. The court sentenced Fredricksen to 30 days of partial confinement on work crew. RP 13; CP 183. Fredricksen's timely notice of appeal followed. CP 178.

B. STATEMENT OF FACTS

Spencer Fredricksen, Reis Magno, and Christina Svidersky were all friends and had been for a while. RP 19-21, 37-38, 46-47, 113-16, 151. Magno and Svidersky lived together in a third-floor apartment and had been a couple, but by February 1, 2016 they were no longer dating. RP 19-20, 46-47. That evening Fredricksen and Svidersky went out for drinks while Magno remained at the apartment. RP 20, 48-49, 113-19.

Upon returning to the apartment, all three of them spent some time hanging out together and Magno joined Fredricksen and Svidersky in drinking alcohol. RP 21-22, 130-33. Svidersky was highly intoxicated. RP 21-22, 48-49, 130-33. After basically passing out and almost falling out of her chair she was placed on the couch to sleep. RP 21-22, 130-33. She testified to having no memory of the incident. RP 48-50.

Magno then went outside to his balcony to smoke a cigarette. While outside he looked inside and watched as Fredricksen attempted to kiss an awake but "not really all there" Svidersky. RP 22, 38. Magno confronted Fredricksen about what he observed and the two went outside

to the balcony to continue the discussion.¹ RP 22-23. The two men were relatively calm at first, but Fredricksen began getting angry and having mood swings. RP 22-23. Fredricksen also started encroaching on Magno, putting his hands on him, and then started shoving him. RP 23. During, and as a result of this escalation, Magno told Fredricksen that he (Fredricksen) had to leave, but Fredricksen continued to refuse. RP 23. After a shove, Magno hit Fredricksen, Fredricksen went after Magno, and Magno put Fredricksen in a headlock. RP 23. At some point the two ended up on the ground and Magno released Fredricksen once Fredricksen agreed to stop fighting. RP 23, 25. Once they were both back up, Magno still had to grab and push Fredricksen to get him out of the door. RP 39-40. Ultimately, both suffered injuries from this encounter. Magno had a cut on his hand and cuts or abrasions to both sides of his neck, though the abrasions on one side were quite minor. RP 77-78, 231. Fredricksen had a bloody lip or mouth from getting punched. RP 65-66; CP 166-67.²

A couple minutes later, and from outside the apartment, Fredricksen made two calls to Magno. It appears that at first Fredricksen

¹ While the very general story about what happened between the two outside on the balcony is consistent, i.e., they got into a physical altercation and Magno kicked Fredricksen out of the apartment, the rest of the details vary pretty widely.

² For ease of review the State is citing the clerk's papers for the relevant pictures. These pictures were admitted at trial as Exhibits 7 and 8.

called in an attempt to apologize to Magno,³ but it devolved into Fredricksen asking Magno to come outside and fight and when Magno refused Fredricksen screamed at him that he was “getting his gun and I’m coming for you.” RP 28-30, 42, 64-65, 90-92; Ex. 21, Ex. 31.⁴ After hearing about the gun Magno immediately hung up the phone and called 911. RP 32, 101; Ex. 21. He told the 911 operator that Fredricksen threatened him with a gun. RP 97-99; Ex. 21. Magno was scared that Fredricksen might shoot him and feared for his life as a result of Fredricksen’s threat. RP 32-34, 63, 77-79, 92; Ex. 21, Ex. 31.

While Magno was on the phone with 911, Fredricksen did exactly what he told Magno he would do: he went to his car, retrieved his loaded firearm, which had a bullet in the chamber, and returned to Magno’s apartment. RP 56-58. Fredricksen went up the requisite three flights of stairs and then crouched down in the shadows just around the corner from the door to Magno’s apartment. RP 53-54. In fact, that is where responding officer Therman Bibens of the Vancouver Police Department found Fredricksen. Fredricksen immediately put his hands up, identified

³ Magno testified that Fredricksen did not talk about Svidersky during these phone calls. RP 28-30, 39.

⁴ The content of the calls is sourced from Magno’s trial testimony, his call to 911, his written statement, and his statements to Ofc. Bibens, which were admitted as excited utterances. RP 80-81. The trial court specifically stated that it found most credible Magno’s statements to Ofc. Bibens since the officer was a non-interested, non-intoxicated party who wrote down what Magno said happened. RP 235-37.

himself, and told the responding officers about the gun. RP 53-55, 85. Ofc. Bibens retrieved the gun from the back right pocket of Fredricksen's pants. RP 55, 85.

Ofc. Bibens observed that Fredricksen was obviously intoxicated. RP 66, 181-83.⁵ Ofc. Bibens also observed Fredricksen dealing with mood swings as "at times he was calm and cooperative but at other times he would yell at the top of his [] lungs - swear at me - cuss" and described him as "[k]ind of aggressive in nature – as aggressive as you can be still in cuffs and sitting on a [sic] stairs." RP 67-68, 182. When telling Ofc. Bibens his version of the events, Fredricksen relayed a story very similar to the above and stated that he got the gun because he "needed to protect" Svidersky before beginning to cry and saying "I will go to prison for that girl." RP 70, 86, 183. During this contact Fredricksen did not, however, allege that Magno assaulted Svidersky or that Svidersky was involved in the altercation on the balcony between Fredricksen and Magno. RP 67-70, 181-83. After speaking with Fredricksen and Magno, Ofc. Bibens had no reason to believe that Svidersky had been assaulted. RP 71-72.

Fredricksen testified at trial. *See* RP 111-166. He discussed his relationship with Magno and Svidersky and provided a more in-depth

⁵ Ofc. Bibens also observed that Magno appeared intoxicated but "not nearly as much as Mr. Fredricksen," and was not experiencing mood swings like Fredricksen. RP 183.

timeline on the events that night that led up to incident in question to include kissing Svidersky. RP 113-19, 123-24, 130-33, 152-57.

Fredricksen testified that once he was aware that Magno observed the kiss that he jumped up and said “sorry” and agreed that he should leave, but that he needed to get his jacket first. RP 134-35. Fredricksen testified that Magno was immediately angry, balling up his fist, and said “I’m going to punch you” before doing a “180,” saying “[e]verything’s fine,” and inviting Fredricksen and Svidersky out onto the balcony to “talk about it.” RP 135, 157-58. Once out there, however, Fredricksen said that Magno got angry again, wanted to punch him, and that while coming towards him that Magno shoved Svidersky, who was between the two, to the ground. RP 136, 159.

Fredricksen testified that he then tried to help Svidersky up, but that his hand brushed Magno’s shoulder, which Magno used as “permission to hit” him in the face. RP 136-37. Fredricksen then claimed that he grabbed Magno to prevent further blows and that they both fell to the ground where Svidersky broke them up. RP 137. This, according to Fredricksen, allowed him to run to the front door of the apartment and escape the scene. RP 137-38. Once outside Fredricksen claimed that he attempted to call five or six friends because he needed “help to get

Christina out of the house.” RP 139, 161. That didn’t work out so

Fredricksen decided to call Magno.

Fredricksen testified that while on the phone with Magno he:

apologized for having the kiss happen because I didn’t want that to happen in general. I said that – you know – even though that happened I’m still – you know – You just beat me up and I’m scared for Christina’s safety and that she needs to come downstairs because your violent temper is not very – you know – you’re being a violent maniac right now essentially – I mean.

RP 140. According to Fredricksen, Magno, before hanging up, responded by stating that Svidersky “was fine and that if I was still downstairs he was going to come down and kick my ass.” RP 141.

Not to be denied, Fredricksen immediately called Magno back and purportedly said “no she’s not safe – she needs to come downstairs – you just showed that you can be pretty violent.” RP 141. Magno, in response, again threatened to come down and “kick [Fredricksen’s] ass” at which point Fredricksen claims he said “you can do whatever you need to do – but I’m not going to get beaten up again. I’m going to go to my car and get my gun” at which point the conversation ended. RP 142, 162.

Fredricksen then went to his car and retrieved his gun, which he was legally permitted to carry, and returned to Magno’s apartment. RP 146-47. He testified that he returned and hid outside the apartment in order

to “hear if there was any sounds of distress from” Svidersky and that he hoped that Magno did not know he because he “didn’t want [Magno] coming out and escalating the situation. RP 147-48, 161.

ARGUMENT

- I. Sufficient evidence established that Fredricksen knowingly threatened to kill Magno, that his words or conduct placed Magno in reasonable fear that the threat to kill would be carried out, and that Fredricksen’s threat was a “true threat.”

Pursuant to RCW 9A.46.020 a person is guilty of harassment if:

[(1)](a) [w]ithout lawful authority the person knowingly threatens:

(i) [t]o cause bodily injury immediately or in the future to person threatened; [and]

...

(b) [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. . . .

RCW 9A.46.020(1). A person is guilty of felony harassment if the threat is to “kill the person threatened.” RCW 9A.46.020(2)(b)(ii). Furthermore, the State must also prove that the threat was a “true threat.” *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004). Fredricksen argues that the State presented insufficient evidence for each of the substantive elements of felony harassment. These arguments involve an impermissible reweighing of the evidence and the credibility of the witnesses as well as a

misapprehension of the applicable law. Thus, this Court should reject Fredricksen's arguments.

a. Standard of Review

Evidence is sufficient to support a conviction if, when viewed in a 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, 829 P.2d 1068 (1992). Accordingly, in order to determine whether the necessary quantum of proof exists, the reviewing court "need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's case." *State v. Gallagher*, 112 Wn.App. 601, 51 P.3d 100 (2002) (citations omitted).

"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. This means that "these inferences 'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014) (quoting *Salinas*, 119 Wn.2d at 201). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Moreover, the "criminal intent of the accused may be inferred from the conduct

where it is plainly indicated as a matter of logical probability.” *Delmarter*, 94 Wn.2d at 638.

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). In other words, an appellate court does not “reweigh the evidence and substitute [its] judgment for that of” the fact finder. *State v. McCreven*, 170 Wn.App. 444, 284 P.3d 793 (2012) (citation omitted). This admonition is especially true as it pertains to witness credibility since the fact finder was able to “observe[] the witnesses testify first hand.” *Id.* (citation omitted); *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004) (noting that “[c]redibility determinations are for the trier of fact and are not subject to review”) (citation omitted).⁶ Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a fact finder best resolves. *State v. Hayes*, 81 Wn.App. 425, 914 P.2d 788 (1996) *rev. denied* 130 Wn.2d 1013 (1996).

⁶“A judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers.” *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991) (discussing, relevantly, how a trial court comes to form its opinion regarding the fitness of a person to be a juror).

While the sufficiency of evidence standard of review, referenced above, generally applies, appellate courts in harassment cases also apply “the rule of independent review” to determine whether the statements at issue constitute a “true threat.” *Kilburn*, 151 Wn.2d at 52; *State v. Kohonen*, 192 Wn.App. 567, 370 P.3d 16 (2016) .This independent review, however, is “limited to review of those ‘crucial facts’ that necessarily involve the legal determination” of whether there was a “true threat.” *Id.*; *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006) (stating that “[c]rucial facts” are only those “so intermingled with the legal question as to make it necessary . . . to analyze the facts.”) (quotation omitted). The purpose of the rule of independent review is to ensure that “the judgment does not constitute a forbidden intrusion on the field of free expression.” *Kilburn*, 151 Wn.2d at 50 (quotation omitted).

Nevertheless, the rule of independent review “*does not* extend to factual determinations such as witness credibility.” *State v Locke*, 175 Wn.App. 779, 307 P3d 771 (2013) (citing *Johnston*, 156 Wn.2d at 365-66); *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). That is, “even when conducting an independent review, the appellate court must strongly defer to the [fact finder]’s determinations of credibility” because of “the fact finder’s unique opportunity to observe and weigh witness testimony.” *Duc Tan v.*

Le, 177 Wn.2d 649, 300 P.3d 356 (2013) (citing *Harte-Hanks*, 491 U.S. at 688-89).

b. The Evidence was Sufficient to Convict Fredricksen of Felony Harassment

1. Fredricksen threatened Magno and his threat constituted a “true threat.”

RCW 9A.04.110(28) defines “threat” in the context of the harassment statute “in the following terms: ‘threat’ means to communicate, directly or indirectly the intent: (a) [t]o cause bodily injury in the future to the person threatened. . . . In turn, the plain meaning of ‘communicate’ includes non-verbal conduct.” *State v. Pinkney*, --- Wn.App. ----, 411 P.3d 406, 410 (2018); *State v. Toscano*, 166 Wn.App. 546, 271 P.3d 912 (2012) (relying on Black’s Law Dictionary to hold that communication includes “gestures[] or conduct”); RCW 9A.46.020. Thus, conduct, gestures, and non-verbal utterances that convey “to a reasonable person the intention to cause bodily harm to that person” can constitute a threat. *Pinkney*, 411 P.3d at 410.⁷ Accordingly, courts have found that a defendant raising a fist to a victim’s face and growling sufficient to

⁷ Fredricksen claims that “[i]n 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.’” Brief of Appellant at 14, 20 (citing RCW 9A.04.110(12); *State v. Williams*, 98 Wn.App. 765, 991 P.2d 107 (2000)). This is incorrect. Maliciousness is only relevant to harassment charged under RCW 9A.46.020(1)(a)(iv) and *Williams*, which was reversed, does not hold otherwise. 98 Wn.App. at 770-71 (discussing RCW 9A.46.020(1)(a)(iv)) *rev’d* 144 Wn.2d 197, 26 P.3d 980 (2001).

constitute a threat as well as a defendant's physical behavior of taking a "fighting stance." *Id.*; *State v. Burke*, 132 Wn.App. 415, 132 P.3d 1095 (2006).

The harassment statute also requires that the defendant "knowingly threatens. . . ." RCW 9A.46.020(1)(a). This means that "the defendant must subjectively know that he or she is communicating a threat. . . ." *State v. J.M.*, 144 Wn.2d 472, 28 P.3d 720 (2001).

In addition, and in order to sustain a conviction, the State must also prove that a defendant's threat was a "true threat." *See Kilburn*, 151 Wn.2d 36. A "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 person." *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010). Accordingly, an objective standard focusing on the speaker is utilized to determine whether a true threat has been made. *Kilburn*, 151 Wn.2d at 44.

More specifically, a "true threat" is "a serious threat, not one said in jest, idle talk, or political argument." *Id.* at 43. A "true threat" does not receive constitutional protection because the State has a significant interest in protecting "individuals from the fear of violence, the disruption engendered by that fear, and the possibility that the threatened violence

will occur.” *Johnston*, 156 Wn.2d at 362 (citations omitted). Importantly, a “true threat” is not protected by the First Amendment even if the speaker never intends to carry out the threat. *Kilburn*, 151 Wn.2d at 46-48; *Johnston*, 156 Wn.2d at 362 (citations omitted).

Because the nature of a threat “depends on all the facts and circumstances . . . it is not proper to limit the inquiry to a literal translation of the words spoken.” *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003). This common sense conclusion stems from the fact that the literal meaning of the words is not necessarily the intended meaning, and “the true meaning of the words may be lost if they are lifted out of context.” *State v. Scherck*, 9 Wn. App. 792, 514 P.2d 1393 (1973); *Locke*, 175 Wn.App. at 790 (remarking in examining whether a statement was a “true threat” that “[s]tatements may ‘connote something they do not literally say.’” (internal quotation omitted)). As a result,

in true threat cases, it is not just the words and phrasing of the alleged threat that matter, but also the larger context in which the words were uttered, including the identity of the speaker, the composition of the audience, the medium used to communicate the alleged threat, and the greater environment in which the alleged threat was made.

Kohonen, 192 Wn.App. at 580. For example, the demeanor of the individual making the supposed threatening statements can be very important in determining whether speaker made a “true threat.” *Kilburn*,

151 Wn.2d at 52-53 (reversing a conviction for felony harassment for failure to establish a “true threat” where a juvenile defendant was laughing or giggling when he made his comments to a person with whom he often joked).

State v. Barnes is instructive. 158 Wn.App. 602, 243 P.3d 165 (2010). In *Barnes* this court found evidence of possession of a gun box relevant to the determination of whether a threat was a true threat. *Id.* There, the defendant entered a bank and became upset, stating “I feel like going and getting a gun and shooting everyone.” *Barnes*, 158 Wn.App at 605. The defendant left the bank shortly thereafter and an employee called the police. *Id.* Hours later, and about one-half mile from the bank, an officer saw the defendant exit an auto parts store and get into his (the defendant’s) car. *Id.* at 606. The defendant was arrested for felony harassment and placed into the officer’s car while the officer searched the defendant’s vehicle. *Id.* Before entering the defendant’s car, the officer noticed a gun box in plain view and after entering the car found a handgun inside the box, a handful of bullets in the front console cup holder, a mask, and a t-shirt that read “dead or alive.” *Id.*⁸

Barnes held that the fact that the defendant “had access to a gun when he threatened to return and shoot everyone at the bank branch is

⁸ The discovery of the actual gun was suppressed.

evidence which could lead a reasonable person to infer his threat was genuine and that he had taken steps to carry it out.” *Id.* at 608-10. Accordingly, the gun case was “relevant evidence properly offered to prove that [the defendant] made a ‘true threat’ as required to prove a violation of RCW 9A.46.020(1)(a)(i).” 158 Wn.App at 610; *See also State v. Juve*, 174 Wn.App. 1031, 2013 WL 1342348, 4-5 (holding that “evidence of [defendant’s] possession of firearms was relevant to prove the crime of felony harassment,” by showing that his threat was a “true threat” and that “by showing that he actually possessed a gun, the State could present evidence tending to show that [the defendant] should have realized that his threat would be interpreted as genuine”).⁹

Here, Fredricksen made multiple statements that together constitute a “true threat” to kill as evidenced by the words themselves, the corroborative conduct in which Fredricksen engaged, and the larger context in which the statements that were made. The trial court specifically found most credible the statements Magno relayed to Ofc. Bibens at the scene and Magno’s report to 911. RP 235-37. Those statements, which occurred minutes after a physical confrontation wherein Fredricksen was injured and ejected from Magno’s apartment and made

⁹ *Juve* is unpublished. GR 14.1(a) states that “unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate.”

while Fredricksen was heavily intoxicated, included Fredricksen imploring Magno “to come outside and fight me” and once that entreaty was rejected Fredricksen’s threat to Magno that he “was getting his [(my)] gun and I’m coming for you.” RP 64-68, 89-92, 182. Furthermore, on the 911 call Magno explicitly reported being “threaten[ed]” by someone with gun. RP 97-98, 108, 225. Magno then elaborated stating that the person threatening him was Fredricksen and that Fredricksen “just called me and [sic] saying that he’s outside and grabbing his gun out of his car.” RP 98.

There is no evidence to support a claim that Fredricksen’s statements and conduct were said or done “in jest” or part of “idle talk[] or political argument.” *Kilburn*, 151 Wn.2d at 44. On the contrary, Fredricksen actually went to his vehicle to retrieve his firearm, which was loaded and had a bullet in the chamber, and ascended three flights of stairs to Magno’s third floor apartment where he secreted himself, while armed, in a dark corner near the door to Magno’s apartment. Like in *Barnes* and *Juve*, this behavior and the possession of a firearm are highly indicative that Fredricksen’s “threat was genuine and that he had taken steps to carry it out.” 158 Wn.App at 608-610; 2013 WL 1342348 at 4-5. Simply put, Fredricksen said he was “was getting his gun” and “coming for [Magno]” and then he did just that. RP 64-68, 89-92, 182.

Even Fredricksen himself testified that he wanted Magno to think he was serious about his using his firearm. RP 165-66. When asked why he told Magno about the firearm Fredricksen responded, “I wanted him to think that I wanted Christina safe.” RP 165-66. The implication of that statement is straightforward. As the trial court persuasively explained:

The statement I’m going to grab my gun alone pre-supposes that Fredricksen is coming back – that it’s part of an on-going incident between the parties. So it – it’s not that – otherwise why would he need to communicate that to Mr. Magno? He’s out of the apartment – he’s on his way out – he has access to his vehicle – had obtained his belongings – had access to a 9-1-1 if he was concerned about Ms. – the – Christina. So I’m going to grab my gun – the communication of that to Mr. Magno has very little purpose aside from instilling fear that he would then use the gun.

RP 234. Consequently, Fredricksen’s statements and conduct constituted a “true threat” since they occurred “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.” *Schaler*, 169 Wn.2d at 283.

Fredricksen’s arguments to the contrary are unavailing. Br. of App. at 15-16. First, Fredricksen briefly discusses *Kilburn* wherein our Supreme Court, after an independent review of the record, determined that a juvenile’s statements to a classmate about bringing a gun to school and shooting everyone did not constitute a “true threat.” Br. of App. at 15-16;

151 Wn.2d 36. As Fredricksen correctly notes, *Kilburn* so concluded because it determined that the juvenile was joking. Br. of App. at 15-16; 151 Wn.2d at 52-53. Fredricksen then states that “[s]imilarly, in this case, the statement ‘I’m going to get my gun’ was not a threat, and therefore not a ‘true threat’ to kill.” Br. of App. at 16.¹⁰ But there is almost nothing similar about these two cases and *Kilburn* cannot be described as ineluctably, let alone persuasively, leading to the conclusion that Fredricksen’s threat was not a “true threat.” For one, the gravamen of the *Kilburn* holding was that the juvenile defendant was laughing or giggling when he made his comments and that he made them to a person with whom he often joked. 151 Wn.2d at 52-53. The juvenile, therefore, would not have “foresee[n] that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death.” *Id.* at 49, 53. Fredricksen, on the other hand, made his statements to a person with whom he was just in a physical altercation and while screaming. RP 29. Given the circumstances Fredricksen could foresee that his threat would be taken seriously. In fact, he intended it to be.

¹⁰ Fredricksen divorces his statement “I’m going to get my gun” from his other statement “I’m coming for you” in his analysis despite the trial court specifically finding credible that both statements were made and made in conjunction even if the statements did not form one sentence. Br. of App. at 16, 18-20; RP 234, 236. The trial court’s conclusion is consistent with Ofc. Bibens’s testimony. RP 64-65, 90.

Fredricksen also asserts that “[i]nforming someone that you’re going to exercise your Second Amendment right to arm yourself for self-protection, or to protect another, is protected speech” and that “the statement ‘I’m going to get my gun’ . . . was not a threat, but protected speech under the First Amendment giving notice of intent to exercise a Second Amendment right.” Br. of App. at 16.¹¹ Fredricksen offers no authority for either proposition or for the idea that the protections of the First and Second Amendments combine in this instance to make his conduct lawful. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *State v. Young*, 89 Wn.2d 613, 574 P.2d 1171 (1978) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 372 P.2d 193 (1962)); *State v. Manajares*, 197 Wn.App. 798, 391 P.3d 530 (2017). An appellate court need not consider arguments unsupported by citation to authority. *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991).

¹¹ Fredricksen in attempting to claim that his threat was not a threat also states that “there was uncontroverted testimony that Magno was angry, had assaulted Svidersky, beaten up Fredricksen, and that Fredricksen was concerned for Svidersky’s safety.” Br. of App. at 16. To frame this case in that way one must take only the testimony most favorable to defense from each witness, draw inferences from the defense favorable testimony in a manner that makes it more favorable to the defense, discard testimony not favorable to defense, and then stretch the term uncontroverted to its breaking point. This is inconsistent with the standard of review in a case where the defense claims insufficient evidence.

Furthermore, at trial Fredricksen explicitly disclaimed any reliance on self-defense, defense of another, or any other kind of lawful authority defense. RP 16-17, 124-25, 127-129, 209-210 (the State recognizing that Fredricksen was not asserting self-defense or defense of another). In any event, the trial court, in concluding that the purpose of Fredricksen's statements was to "instill[] fear that he would then use the gun" and that he was "seeking to re-engage with Mr. Magno," necessarily rejected the above argument(s). RP 234.

Finally, as it pertains to the "threat" analysis, Fredricksen spends pages breaking his statements and conduct into constitute parts and then arguing that each part by itself is insufficient to constitute a threat and/or that there is insufficient evidence to support that each part occurred. Br. of App. at 16-21. In so doing Fredricksen advocates that some statements—of his, Magno's, and Ofc. Bibens's—were credibly made while others were not and reweighs those credibly determinations differently than the trial court. Br. of App. at 16-21.

First, as mentioned above, while the rule of independent review is a more searching inquiry than the standard sufficiency review, the independent review is "limited to [a] review of those 'crucial facts' that necessarily involve the legal determination" of whether there was a "true threat." *Kilburn*, 151 Wn.2d at 52. Furthermore, the rule of independent

review does not command, or even allow, a wholesale reweighing of the evidence as the rule “*does not* extend to factual determinations *such as* witness credibility.” *Locke*, 175 Wn.App. at 790-91 (emphasis added) (citing *Johnston*, 156 Wn.2d at 365-66); *Harte-Hanks* 491 U.S. at 688. Other trial court determinations untouched by the rule of independent review include the resolution of conflicting testimony, the persuasiveness of the evidence and “specifics regarding date, time, place, and circumstance.” *Hayes*, 81 Wn.App. at 437; *Locke*, 175 Wn.App. at 788-89, *Johnston*, 156 Wn.2d at 365-66; *Camarillo*, 115 Wn.2d at 71. Consequently, this Court must decline Fredricksen’s invitation to reweigh the credibility of the witnesses, the persuasiveness of the evidence, and other facts not subject to independent review. Additionally, the other evidence not subject to independent review is to be viewed in the light most favorable to the State and not the other way around.

Second, whether a threat is a “true threat” is “determined in light of the entire context” *Kilburn*, 151 Wn.2d at 46, 48; *C.G.* 150 Wn.2d at 611 (noting that the nature of a threat “depends on *all* the facts and circumstances) (emphasis added); *Kohonen*, 192 Wn.App at 580. When Fredricksen dissects the case into pieces and places each part under the microscope in order to come to conclusions consistent with his innocence he ignores the entire context of his threat, which includes all of his

statements and conduct, and the proper method of examination of the evidence. In assessing all of Fredricksen's statements, his conduct, and the total context, the trial court correctly concluded that Fredricksen's threat was a "true threat."

2. *Fredricksen's threat was a threat to kill.*

In order to convict Fredricksen of felony harassment the State was required to prove that Fredricksen's threat was a threat to kill. As discussed above, because the nature of a threat "depends on all the facts and circumstances . . . it is not proper to limit the inquiry to a literal translation of the words spoken." *C.G.*, 150 Wn.2d at 611. This common sense conclusion stems from the fact that the literal meaning of the words is not necessarily the intended meaning, and "the true meaning of the words may be lost if they are lifted out of context." *Scherck*, 9 Wn. App. 792, 794, 514 P.2d 1393 (1973); *Locke*, 175 Wn.App. at 790 (remarking in examining whether a statement was a "true threat" that "[s]tatements may 'connote something they do not literally say.'" (internal quotation omitted)). The statutory definition of threat is in accordance as the definition includes threats made "directly or *indirectly*." RCW 9A.04.110(28) (emphasis added). As a result, a person can be convicted

for a “threat to kill” without using the words “kill” or “dead” in his or her threat. *C.G.*, 150 Wn.2d at 610-11.

Moreover, because the rule of independent review only pertains to whether a threat was a “true threat” it has no place in determining whether a “threat” was a threat to kill. *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016); *Kilburn*, 151 Wn.2d at 52. Instead, the standard sufficiency review applies wherein the inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Homan*, 181 Wn.2d at 106.

Here, the trial court, when viewing the threats within the context of the entire altercation, concluded that inserting the firearm:

into the altercation [and] the threat that comes with the firearm. And that is to be shot and – and I think that’s synonymous with being killed – the statement. . . . Here we have a vague reference but conduct supporting that it’s – it’s a threat. And so I do find that there is a threat to kill.

RP 237, 239. This conclusion is straightforwardly reasonable considering that the trial court specifically found most credible the statements Magno relayed to Ofc. Bibens at the scene and Magno’s report to 911. RP 235-37. Those statements, which occurred minutes after a physical confrontation wherein Fredricksen was injured and ejected from Magno’s apartment and made while Fredricksen was heavily intoxicated, included Fredricksen imploring Magno “to come outside and fight me” and once that entreaty

was rejected Fredricksen's threat to Magno that he was "getting his [(my)] gun and I'm coming for you." RP 64-68, 89-92, 182. As the trial court also appropriately noted, a person saying "I'm going to grab my gun" means one thing "in the context of a firearm sale at the fairgrounds" and quite another "in the context of what was a physical altercation." RP 234-35. Considering the trial court's credibility determinations, and taking all the evidence in the light most favorable to the State and drawing inferences most strongly against Fredricksen, the State presented sufficient evidence that Fredricksen's threat was a threat to kill.

3. *Magno reasonably feared that Fredricksen would carry out his threat to kill him.*

In order to convict Fredricksen of felony harassment the State was required to prove that Magno reasonably feared that Fredricksen would carry out his threat to kill him. Whether sufficient evidence supported a victim's reasonable fear that a threat would be carried out is subject to the standard sufficiency of the evidence review. *State v. Cross*, 156 Wn.App. 568, 234 P.3d 288 (2010); *see also State v. Lowe*,¹² 186 Wn.App. 1014,

¹² *Lowe* is unpublished. GR 14.1(a) states that "unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate."

2015 WL 914557 at 2.¹³ And more specifically, “the reasonableness of such fear [i]s a question for the trier of fact in light of the total context.” *Trey M*, 186 Wn.2d at 905-906. This context, of course, includes the “words or conduct of the perpetrator.” *Id.* Moreover, a considerable distance or some kind of physical barrier separating the parties does not mean the evidence is insufficient when the speaker threatens future harm. *See State v. Alvarez*, 74 Wn. App. 250, 872 P.2d 1123 (1994), *aff’d*, 128 Wn.2d 1, 904 P.2d 754 (1995).

Trey M is instructive. 186 Wn.2d 884. There, a juvenile was upset with three boys who teased him at school. During a counseling session he told his counselor, amongst other things, that he thought about shooting the boys, that he wanted to kill them, and that he had a specific plan to do so. *Id.* at 888. This information was eventually communicated to the boys who were told that they were on Trey’s “hit list.” *Id.* at 890-91. Each boy testified at trial about his fear. *Id.* One said he was really scared at first and scared his life *could* have been taken. *Id.* The other two testified that they

¹³ Relying on *C.G.*, Fredricksen claims that this “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.” Br. of App. at 22. This is incorrect; *C.G.* holds no such thing. *See* 150 Wn.2d 604-612. Instead *C.G.* correctly notes that “[t]he meaning of a statute is a question of law that an appellate court reviews de novo.” *Id.* at 608 (citation omitted). The court then reviews the felony harassment statute and holds that to sustain a conviction for a threat to kill that the victim must be in reasonable fear of the actual threat made—the threat to kill. *Id.* at 609-610, 612.

were “scared,” “really shaking,” and “freaked out.” *Id.* Trey was convicted of three counts of felony harassment for his threats to kill.

On appeal, Trey challenged the sufficiency of the evidence of the boys’ fear of any threat to kill, but our Supreme Court summarily rejected that argument stating that “[h]ere, each boy testified that when he heard that he was on Trey’s ‘hit list,’ he was ‘scared.’ That is sufficient.” 186 Wn.2d at 905.

Here, the trial court specifically held that “Magno, I do think he was in reasonable fear. He was fearful at that time. I don’t think anybody disputes that.” RP 233.¹⁴ The trial court could easily reach that conclusion since Magno testified that after being threatened he was “scared obviously” and when asked if he was “worried that [Fredricksen] was going to shoot you” he responded “[y]es. That’s why I called the cops.” RP 33-34. This testimony was consistent with his written statement where he wrote that “I was scared he might shoot me,” his immediate call to 911 to report being threatened with a gun, and his demeanor while on the phone with 911. RP 97-104; Ex. 21; Ex. 31. Ofc. Bibens corroborated Magno’s fear as well testifying that Magno appeared nervous and jittery and told him that he was scared or worried for his life upon hearing the

¹⁴ The trial court continued later stating: “I looked at the conduct by Mr. Magno of calling 9-1-1 right away. That is reasonable to me. He perceives of a threat which – which corroborates the law enforcement officer’s representation of what occurred.” RP 236-37.

threat. RP 63, 77-79, 92. Consequently, like in *Trey M*, the evidence was sufficient to establish Magno's fear of the *actual* threat and the reasonableness of that fear.

Nonetheless, and despite the applicable standard of review, Fredricksen claims that “[i]n light of the history of their relationship, and the entire context, the overwhelming evidence . . . is that Fredricksen would not have foreseen that Magno could reasonable interpret his statements as a threat to kill” and that the “evidence . . . is insufficient to establish that Magno reasonably feared that” Fredricksen would carry out his threat to kill. Br. of App. at 21-22. He supports his first claim with a 7 bullet point list. Br. of App. at 21. The first three are unobjectionable: Magno and Fredricksen had been friends, their friendship included playing sports and video games, and they had never been in a fight before. Fredricksen then claims in two additional bullet points that Magno testified that “Fredricksen is not a violent person” and that “he has never known Fredricksen to hurt anyone.” Br. of App. at 21. This “evidence” was objected to and sustained. RP 41.¹⁵ It, therefore, has no place forming the basis of any argument on appeal. Finally, Fredricksen lists that Magno testified that Fredricksen did not “threaten to shoot him” or “threaten to kill him.” Of course, nobody had ever claimed that Fredricksen literally

¹⁵ In a bench trial “we presume the trial judge did not consider inadmissible evidence in rendering the verdict.” *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002).

threatened to shoot or kill Magno. Moreover, the list is bereft of any of the other statements attributed to Magno regarding what Fredricksen said.

Thus, what's missing from Fredricksen's argument is the *entire* context or really any piece of evidence that did not redound to his benefit, which could have included his physical altercation with Magno in which *both* suffered injuries, his high level of intoxication, his mood swings, his screaming, his retrieval of a loaded firearm, or his ascension of three flights of stairs where he ended up crouched down and armed in the shadows outside Magno's door. Br. of App. at 21.

Fredricksen essentially makes one argument to support his second claim—that there was insufficient evidence to establish Magno's fear—and that argument is that "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." Once again, this argument ignores the evidence upon which the Court ruled and the majority of the relevant evidence on the issue to include Magno's own statements—on the stand, in writing, and to Ofc. Bibens—Magno's decision call to 911 and lock the door, and Ofc. Bibens's observations of Magno. Also, a listen to the 911 call also suggests that door was only opened one time prior to the arrival of the police, despite Fredricksen's testimony to the contrary, and that Magno remained nervous or scared. RP

63, 149; Ex. 21. Fredricksen's argument fails. Taking the evidence of Magno's fear in the light most favorable to the State and acknowledging that "the reasonableness of such fear was a question for the trier of fact," sufficient evidence supported Magno's reasonable fear that Fredricksen's threat would be carried out.

CONCLUSION

For the reasons argued above, this Court should affirm Fredricksen's conviction.

DATED this 9 day of April, 2018.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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