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Division II
State of Washington
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II
#50935-1-II

STATE OF WASHINGTON

Respondent

vs.

SPENCER J. FREDRICKSEN

Appellant

REPLY BRIEF OF APPELLANT

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. ARGUMENT AND AUTHORITIES

A. **Independent review of the record does not establish that Fredricksen truly threatened to kill Magno.**

The “true threat” inquiry “implicates core First Amendment protection.” *State v. Kilburn*, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). The First Amendment requires more than application of the usual standard of review for sufficiency of the evidence. *Id.*, at 48-49. Instead, independent review of the entire record is required. *Id.*, at 50. Although independent review does not extend to witness credibility, it does encompass any and all facts crucial to determining whether Fredricksen truly threatened to kill Magno. *State v. Locke*, 175 Wn.App. 779, 790-91, 307 P.3d 771 (2013). Crucial facts are those facts so intermingled with the legal question that it is necessary to analyze them in order to pass on the constitutional question. *Kilburn, supra*, at 50-51; *Locke, supra*, at 790.

In the case at bench, an array of crucial facts either overlooked or unappreciated by the Trial Court, and having nothing to do with credibility, tend to show that Fredricksen did not threaten Magno, and certainly did not threaten to kill him, considering the entire context in which the statements were made. Those include:

- Their long-standing friendship. RP I 20, 37, 114
- There was no animosity between the two of them before that night. RP I 37
- There had never been any physical conflict between the two of them before that night. RP I 37
- Fredricksen did not threaten to shoot Magno. RP I 40
- Fredricksen did not threaten to kill Magno. RP I 40
- Fredricksen was intoxicated, making it likely that his statements, to the extent they could be interpreted as a threat, were hyperbole.¹

¹ Hyperbole is defined as: “Exaggerated statements or claims not meant to be taken literally.” Synonyms include exaggeration, over-statement, magnification, embroidery, embellishment, excess, overkill, and rhetoric. Appendix A

- Fredricksen did not actually attempt to engage or confront Magno in his apartment.
- Where Fredricksen was found by the police is consistent with listening near the door to make sure Christina was safe.
- Magno opened the door while he was on the phone with 911, but Fredricksen made no attempt to engage or confront him then, RP I 103, which is corroborative of Fredricksen's testimony that he was merely standing by to ensure Christina's safety.

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 . . . take the life of another person." *State v. Kilburn, supra*, at 43. For all of the above reasons, Fredricksen could not have reasonably expected that

Magno would interpret the statements he made as a “true threat” to kill him.

In evaluating whether or not there was a “true threat” in the context of a *felony* harassment case, the issue is whether there was a “*threat to kill*”. This was analyzed by the Court in *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003):

The logical way to read the statute is to conclude, the same as in the case of misdemeanor threats, that the fear in the case of the threat to kill must be of the actual threat made - the threat to kill. Thus, the statute means that subsection (2)(b) adds a threat not listed in subsection (1)(a), i.e., a threat to kill.

Whatever the threat, whether listed in subsection (1)(a) or a threat to kill as stated in subsection (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.

Obviously, if the felony harassment statute contemplates that the State must prove that the victim was placed in reasonable fear that the threat of death would be carried out, then the statute also contemplates that the State must prove that a reasonable

person standing in the shoes of the defendant could expect that his statement would be interpreted as a serious expression of intent *to kill*. Given the long-standing friendship, lack of prior animosity or physical conflict between the two before that night, the absence of any threat to shoot or threat to kill, Fredricksen's intoxication (making it likely that the alcohol was doing the talking), and the fact that Magno opened the door while he was on the phone with 911 (showing he was not afraid of being shot), Fredricksen could not have reasonably expected Magno to believe he intended to kill him. As a result, there was no true *threat to kill*.²

Moreover, hyperbole does not constitute a true threat as explained by the Court in *State v. Locke, supra*, at 790. There, the defendant sent several harassing emails to Governor Gregoire. He

² The State cites *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016), and *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004), for the proposition that "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." While both cases analyze the sufficiency of the evidence constituting a "true threat", neither case supports the State's position. On the contrary, in *State v. C.G., supra*, the Court reviewed the record *de novo* in holding "that 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.

was convicted of felony death threat harassment and appealed, arguing that his communications did not amount to a true threat. The Court of Appeals affirmed, but agreed that some of the emails contained hyperbole or otherwise constituted protected speech. For example, Locke's first email identified his city as "Gregoiremustdie" and stated his desire for the governor to witness a family member "raped and murdered by a sexual predator" because the governor had put the State "in the toilet".

Locke's second email again identified his city as "Gregoiremustdie" and expressed that the governor should be "burned at the stake like any heretic". Although this second message specified that someone should kill the governor, it was not interpreted by the Court as Locke threatening to do so himself, and therefore "would at best reach only the margins of a true threat".

On the other hand, Locke's third email identified his organization as "Gregoire Must Die [sic]," and invited the governor to stage "Gregoire's public execution" at the governor's

mansion. The Court held this was a true threat because it plainly suggested an attempt to plan an execution.

Comparing the statements made by Locke to those made by Fredricksen in this case, it is difficult to see how Fredricksen's conviction can be sustained. He did not threaten to shoot Magno. He did not threaten to kill Magno. He did not threaten to rape or murder Magno. He did not express that he wanted to burn Magno at the stake, or otherwise harm him in any way. If the first two email communications by Locke represent examples of protected speech, then the ambiguous statements made by Fredricksen in this case should likewise be protected for several reasons:

- Declaring that you are going to get your gun is not the same thing as saying you're going to use your gun.
- Arming yourself is a Second Amendment constitutional right reinforced in this case by the fact that Fredricksen had a concealed carry permit.³

³ Authority for this is the Second Amendment and the Washington Concealed Carry Statute.

- Even when coupled with the statement, “I’m coming for you”, there is no direct threat to harm Magno, much less *kill* him.
- The two statements together are vague, non-specific and fully consistent with Fredricksen’s testimony that he armed himself out of concern for Christina’s safety and for his own self-protection.
- Fredricksen was intoxicated, making it likely that his statements, to the extent that they could be construed as a threat, were hyperbole.

According to the Trial Court, the fact that Fredricksen made the statement that he was going to get his gun was synonymous with shooting Magno. As the Court stated, at RP II, 237-239; State’s brief, at 24:

[T]he threat ... comes with the firearm. And that is to be shot 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.

There are several problems with that. To begin with, just because you are armed with a firearm does not mean you are going to shoot somebody. Second, the Court acknowledges that Fredricksen's statements constituted "a vague reference", as argued herein. Third, the Court concludes that there was "conduct supporting that it's - - it's a threat", when in fact Fredricksen's conduct after he made the statements proves that it was not a threat. For example, he never attempted to engage or confront Magno. He did not challenge him to come outside. He did not knock on the door. Even when Magno opened the door Fredricksen did not approach or attempt to contact Magno. As a result, Fredricksen's conduct contradicts the Court's conclusion that Fredricksen's statements constituted a threat.

Finally, the ruling of the Trial Court acknowledges that Fredricksen's intention was "a plan to rescue Christina." RP II, at 232. Based on that, the statements "I'm going to get my gun" and "I'm coming for you" do not necessarily constitute a threat, but

could just as easily be construed as a warning to Magno. Both the Constitution, and public policy, support warning others that you are armed for self-protection or the protection of others. In this context, the statements do not constitute a “true threat”, but instead protected speech.

B. The evidence does not establish that Magno reasonably believed that he would be killed

In *State v. C.G., supra*, the Court held the State must not only prove there was a threat to kill, but that the person threatened was placed in reasonable fear of *death*, as opposed to merely fear of bodily injury. The Court reviewed the record *de novo*. *Id.*, at 608. Because that is exactly the issue in this case, the Court is required to independently review the record to determine whether Magno was placed in reasonable fear that Fredricksen’s statements amounted to a *threat to kill* him. Once again, an array of facts undermine the sufficiency of the evidence in that regard. They include:

- Their long-standing friendship. RP I 20, 37, 114
- There was no animosity between the two of them before that night. RP I 37
- There had never been any physical conflict between the two of them before that night. RP I 37
- Fredricksen did not threaten to shoot Magno. RP I 40
- Fredricksen did not threaten to kill Magno. RP I 40
- Fredricksen was intoxicated, making it likely that his statements, to the extent they could be interpreted as a threat, were hyperbole.
- Fredricksen did not actually attempt to engage or confront Magno in his apartment.
- Magno opened the door while he was on the phone with 911 but Fredricksen did not make any attempt to engage or confront him then. RP I 103

II. CONCLUSION

Because the sufficiency of the evidence determination “is the heart of the ‘true threat’ inquiry”, core First Amendment protection is implicated. *State v. Kilburn, supra*, at 48. As a result, more than the usual standard of review for sufficiency of the evidence is required. *Id.*, at 48-49. Applying that enhanced standard of review, and under that standard of review, this case should be reversed and remanded with instruction to dismiss.

Dated this 2nd day of July, 2018.



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APPENDIX A

Dictionary

Enter a word, e.g. pie



hy·per·bo·le

/hī pərbəlē/ 

noun

exaggerated statements or claims not meant to be taken literally.

 **exaggeration** overstatement magnification embroidery embellishment excess overkill rhetoric [More](#)

Translations, word origin, and more definitions

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 July 3, 2018, a true copy of the Reply Brief of Appellant was sent to the following persons in the manner indicated:

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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 3rd day of July, 2018.



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