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NO. 51256-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA WILLS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Sally F. Olsen, Judge

BRIEF OF APPELLANT

ALLYSON BARKER
DAVID B. KOCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

There was insufficient evidence to prove beyond a reasonable doubt that appellant committed the crime of harassment of a criminal justice participant.

Issue Pertaining to Assignment of Error

Where the State failed to prove appellant made a threat that he was capable of carrying out, is the evidence insufficient to support the jury's verdict that appellant was guilty of felony harassment of a criminal justice participant?

B. STATEMENT OF THE CASE

1. Procedural Facts

Joshua Warren Wills was charged with one count of felony harassment of a criminal justice participant and one count of DUI. CP 1-2. Following pretrial motions, the court ruled that the initial stop and the arrest of Mr. Wills was proper. 3RP 3.¹ The State agreed not to use some of Mr. Wills' statements, but the court allowed the remaining statements. 3RP 9-10. The court also denied a Knapstad² motion directed at the harassment charge. 3RP 13.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP—October 13, 2017; 2RP—November 1, 2017; 3RP—November 3, 2017; 4RP—November 6, 7, 8, 9, and 13, 2017; 5RP—November 7, 2017; and 6RP—November 17, 2017.

The only trial witness was Trooper Nickolaus Lull. 4RP 76. At the close of the State's case, Mr. Wills moved for a dismissal of both charges. 4RP 211. The court denied his motion. 4RP 216, 227-229. The jury found Mr. Wills not guilty of DUI and guilty of felony harassment of a criminal justice participant. 4RP 327. The court imposed a standard range sentence, CP 163, and Mr. Wills timely appealed. CP 174-175.

2. Substantive Facts

In the early morning hours of August 5, 2017, Joshua Wills was asleep in his car on the side of Highway 3 in Kitsap County, Washington. 4RP 81-82. Trooper Lull pulled his patrol vehicle behind Mr. Wills' car and woke him up. 4RP 82. Their interaction led Trooper Lull to suspect that Mr. Wills might be intoxicated, so he asked Mr. Wills to step out of the car. 4RP 83-84. Trooper Lull asked Mr. Wills to do field sobriety tests, and Mr. Wills declined. 4RP 84-85. A check of Mr. Wills' criminal history revealed that he had prior convictions for assault and felony harassment. 4RP 83-84. Trooper Lull arrested Mr. Wills for refusing the field sobriety tests and put him in the back of his patrol car. 4RP 84-85.

² State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

Trooper Lull drove Mr. Wills to the Kitsap County Jail. 4RP 85-86. On the way, Mr. Wills argued with him about why he was arrested, accusing Trooper Lull of arresting him for sleeping in his car. 4RP 86. Trooper Lull could hear Mr. Wills praying for God to dishonor or hurt the trooper's family. 4RP 85-86. Mr. Wills also claimed to be a profit "you don't want to fuck with." 4RP 86. He repeatedly told Trooper Lull to "read his profile and that it all comes true." 4RP 86. He also noted he would someday be released and Trooper Lull's entire family would suffer. 4RP 86. Trooper Lull did not believe that Mr. Wills actually had the ability to influence God's actions toward him or his family. 4RP 94, 178.

When they arrived at the jail, Mr. Wills told Trooper Lull "he was not going to give up easily." 4RP 88. He said that as soon as Trooper Lull opened the door he was going to fight him and that he already had a felony conviction for beating up a cop. 4RP 88. Trooper Lull conceded, however, that at the time he said this, Mr. Wills was in the back of the police car "seat belted, hands cuffed, doors locked" and he did not have the ability to cause him any bodily

harm. 4RP 90, 143-144. Still, Trooper Lull testified he took Mr. Wills' threat seriously and was fearful.³ 4RP 88, 90-91, 192.

When they arrived at the jail, three corrections officers were present. 4RP 145. Trooper Lull did not have to be the one to open the back door of the police car, but he chose to open the door anyway and was able to reach in, take off Mr. Wills' seat belt, and help him out of the car. Other than Mr. Wills unsuccessfully attempting to startle Trooper Lull by yelling "Rah," the removal occurred without incident.⁴ 4RP 89-90, 146-148, 153.

During closing arguments, the prosecutor argued that Wills' threat to fight Trooper Lull satisfied the elements of harassment of a criminal justice participant. 4RP 290-294. Defense counsel argued that it did not. 4RP 304-311.

³ Trooper Lull also testified that he feared Mr. Wills might harm him or his family in the future following his release. 4RP 178. But the State did not allege this as a basis for the harassment charge. 4RP 249.

⁴ Mr. Wills subsequently became difficult with jail staff. He was held down, cuffed, and placed in solitary confinement. 4RP 90.

C. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT MR. WILLS HAD THE PRESENT OR FUTURE ABILITY TO CARRY OUT HIS THREAT

In criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The proper remedy where the evidence is deemed insufficient to support a conviction is reversal of the conviction and dismissal of the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

A person commits harassment if, "Without lawful authority, the person knowingly threatens: (i) [t]o cause bodily injury immediately or in the future to the person threatened or to any other

person; . . . and [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)-(b). Harassment is a felony if “the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made.” RCW 9A.46.020(2)(b).

“[T]he fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.” RCW 9A.46.020(2)(b). “[I]f it was apparent that the speaker had either the present ability or the future ability to carry out the threat, the statements would constitute harassment.” State v. Boyle, 183 Wn. App. 1, 11, 335 P.3d 954 (2014), review denied, 184 Wn.2d 1002, 357 P.3d 666 (2015).

In Boyle, the court upheld a conviction for harassment of a criminal justice participant where the defendant was arrested for DUI and proceeded to yell profanities at the officer and kick the door of the police car after being placed in the back seat. 183 Wn. App. at 5. The defendant made the following series of statements:

'People will look you and your family up and do them in.' 'I would never threaten your family.' 'I would never attack children, but cops and child molesters are fair game.' 'People should shoot you guys in the face and I'll be glad when they do. I would not do it myself, but you know someone will.' 'Remember Forza Coffee, it was good stuff.' 'Forza Coffee, that's what should happen to all cops and their families.' 'You wait and see what happens when I get out. I'm not threatening you.' 'I hope your children die.' 'F***k your face, f***ing swine. Read my record. Read it twice.' 'Someone will kill you and your family. I'm not saying it's going to be me, but someone is going to snipe cops and their families.'

Id.

The defendant in Boyle argued that the State was required to prove that the criminal justice participant believed the defendant had both the present *and* future ability to carry out the threat. Id. at 9. The defendant argued that because he was handcuffed, intoxicated, and in police custody, he had no present ability to carry out his threats. Id. at 10. Since he lacked the present ability to carry out the threat, and by his reasoning both a present and future ability to carry out the threat were required, he argued that there was insufficient evidence of harassment of a criminal justice participant. Id.

This Court disagreed, finding that the sentence, "Threatening words do not constitute harassment if it is apparent to the criminal

justice participant that the person does not have the present and future ability to carry out the threat” was “phrased as an exception, not as an element” and therefore “if it was apparent to the criminal justice participant that the speaker had either the present ability or the future ability to carry out the threat, the statements would constitute harassment.” Id. at 11.

In rejecting the defendant’s argument that both a present and future ability to carry out the threat was needed, the Boyle court implicitly held that the defendant did not have the present ability to harm the officer because he was in the back of the police car. Had the court believed Boyle had the present ability to harm the officer when he was handcuffed and in the back of the police vehicle, there would have been no need to clarify that RCW 9A.46.020 could be satisfied by a present or future ability to carry out the threat. If the court believed Boyle had the present ability to carry out a threat while handcuffed and in the back of the police car, it could have upheld his conviction without holding that a threat of future harm alone would satisfy the statute.

In State v. Bradley, 3 Wn. App. 2d 1035, at *1-*2 (2018),⁵ the court found that the defendant committed felony harassment of a criminal justice participant when he told a police officer, “I won’t hesitate, the next time I see you I’m going to kill you, even if you’re walking with your daughter or child, I’ll kill them too.” At the time he made these threats, the defendant was handcuffed and in the back of the police car. Id. at *1. Because he was handcuffed and in the back of the police car, it was agreed that he did not have the present ability to carry out the threat. Id. at *2.

In contrast to the facts in Boyle and Bradley, Mr. Wills did not make a future threat to harm Trooper Lull. He said that “he was not going to give up easily” and that as soon as Trooper Lull “opened the door he was going to fight” him. 4RP 88. He also said that he already had a felony conviction for beating up a cop. 4RP 88. This was a threat to do something in the present, not a threat of future harm. The threat Mr. Wills made in this case was not a future threat like those made in Boyle and Bradley. At the time he made it, he was handcuffed and belted in the back of a police car. 4RP 146. Trooper Lull testified that when Mr. Wills was in the back of

⁵ Under GR 14.1, Wills does not cite to this unpublished decision as binding authority. Rather, he cites it for whatever persuasive authority this Court deems appropriate.

his car, it was not possible to cause him bodily harm. 4RP 143-44. He also testified that he did not have to be the one to open the car door; he could have been standing twenty feet away and had corrections officers from the jail open the door. 4RP 147-48. Like the defendants in Boyle and Bradley, Mr. Wills did not have the present ability to carry out his threat because he was secured in the back of a police car.

Because Mr. Wills did not have the present ability to carry out his threat, and because he did not make a threat to harm Trooper Lull in the future, there was insufficient evidence for a jury to find, beyond a reasonable doubt, that he was guilty of harassment of a criminal justice participant. Therefore, Mr. Wills' conviction should be dismissed.

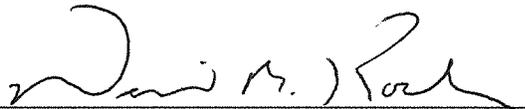
D. CONCLUSION

Mr. Wills made a threat to fight Trooper Lull, but it was apparent that he had no present ability to carry it out. Therefore, the evidence was insufficient for a reasonable jury to find Mr. Wills guilty of harassment of a criminal justice participant. Mr. Wills requests that this Court reverse and dismiss his conviction.

DATED this 31st day of July, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



ALLYSON BARKER, WSBA No. 35448

DAVID B. KOCH, WSBA No. 23789

Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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