NO. 288617-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
NOV 04 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

THE STATE OF WASHINGTON, Respondent

v.

AARON MALCOLM URBINA, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-01158-7

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ADRIENNE M. FARABEE, Deputy
Prosecuting Attorney
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STATEMENT OF THE CASE

On December 10, 2010 at 7 a.m., Officer Drew Sneyd was on duty along with Officer Salter and Officer Bowe. (RP 02/08/09, 9). The officers were dispatched to a disturbance call involving the defendant who was noncompliant. (RP 02/08/09, 9-10).

When Officer Sneyd arrived at the scene, the defendant was walking towards a passenger car that was parked outside in front of the residence to which the officers were dispatched. (RP 02/08/09, 9). Upon contact with the defendant, Officer Sneyd directed the defendant to stop three to four times, and Officers Salter and Bowe also instructed the defendant to stop. (RP 02/08/09, 10, 40). The defendant pulled keys out of his pocket and continued to walk towards the car. (RP 02/08/09, 10-11). The defendant reached the car and opened the driver's door against the officer's instructions. (RP 02/08/09, 10). The defendant then reached into the driver's-side

passenger seat area, and eventually after repeated instructions from the officers, slowly exited the car. (RP 02/08/09, 12). The defendant was placed under arrest for obstructing. (RP 02/08/09, 13).

Officer Sneyd advised the defendant they needed to walk about 40 yards back to the patrol car at which point the defendant dropped his weight and would not walk, preventing Officer Sneyd from getting the defendant back to the patrol car. (RP 02/08/09, 13). Officer Bowe attempted to assist Officer Sneyd, but the defendant decided to drop his weight again, so the two officers basically carried the defendant back to the patrol car. (RP 02/08/09, 13). As the officers were guiding the defendant back to the car, the defendant continued to use multiple curse words towards the officers. (RP 02/08/09, 13). The defendant was trying to swing and kick and called the officers little bitches and "every cuss word you can think of." (RP 02/08/09, 42).

As they neared the front of the patrol car, the defendant tried several times to actively pull away from Officer Bowe. (RP 02/08/09, 14). Due to the defendant's uncooperative behavior, Officer Bowe took the defendant down to the ground. (RP 02/08/09, 13). The defendant continued to use curse words, "fuck you, I didn't do anything. Let me go, homies." (RP 02/08/09, 14-15).

Officer Sneyd attempted to search the defendant incident to arrest, and the defendant reared his head back and looked at Officer Bowe stating in a very aggressive manner, "You better watch your family." (RP 02/08/09, 15, 43). Officer Bowe stated that concerned him because he doesn't like people threatening his family. (RP 02/08/09, 44). He also stated that he felt that the defendant would follow through on such a threat. (RP 02/08/09, 44). At that point the defendant lunges forward and gets within an inch or two of Officer Bowe's face and motions like he is going to headbutt him. (RP 02/08/09, 15).

Officer Bowe stopped him from that. (RP 02/08/09, 44). Officer Bowe then took the defendant backwards and placed him onto the ground. (RP 02/08/09, 15, 44). The defendant was then searched and placed into the back of the patrol car. (RP 02/08/09, 16). At this time, the defendant is still fighting in the car and calling the officers names. (RP 02/08/09,44).

Officer Sneyd transported the defendant to the jail, and during the ride the defendant stated that he "didn't give a fuck and that he would - - he didn't care if we were on or off duty, he would come into Denny's and he would smoke any officer he sees." (RP 02/08/09, 16-17). The defendant also used numerous expletives and told Officer Sneyd that "he would reload if he needed to." (RP 02/08/09, 17). He specifically threatened to kill Officer Sneyd, and continued making threats about "smoking officers" while en route to the jail. (RP 02/08/09, 17). Officer Sneyd stated that he believed the threats that

the defendant made, and felt that he would carry them out. (RP 02/08/09, 17). Officer Sneyd testified:

> [T]his [incident] was unique, the threats towards Officer Bowe and his family concerned me. The threats towards me and my fellow officers concerned me. The fact that he [defendant] was brazen enough to say the things he did and his actions that day didn't mean that he wouldn't carry this out in the future.

(RP 02/08/09, 18).

Officer Sneyd then stated that he was concerned enough for his family's safety that he was testifying about it. (RP 02/08/09, 19).

ARGUMENT

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the

evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-7, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App 590, 593, 608 P.2d 1254 (1980). Direct evidence as well as circumstantial evidence may be used to prove an element of the crime charged. *State v. Vermillion*, 66 Wn. App. 332, 342, 832 P.2d 95 (1992).

Circumstantial evidence is "evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 15.01, at 124 (2d ed.1994). A conviction may be based wholly on circumstantial evidence if the evidence is not inconsistent with the hypothesis of innocence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975).

Where the trial court has weighed the evidence, review is limited to ascertain whether the findings of fact are supported by substantial evidence and whether the findings support the conclusions of law and the judgment. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). When there is substantial evidence to support trial court's findings of fact, the reviewing court will not disturb them on appeal and even when the evidence conflicts, reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings. *State v. Black*, 100 Wn.2d 793, 802, 676 P.2d 963.

1. Sufficient evidence exists as to the element of "true threat" and that Officer Dorame was in reasonable fear that the threat would be carried out.

The defendant was charged with Felony Harassment. RCW 9A.46.020(1)(a)(i)(b), and (2)(b)(ii) defines Felony Harassment as:

> (1) A Person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. … (2)(b)(ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

RCW 9A.46.020 (1)(a)(i)(b), and (2)(b)(ii).

A "true threat", which is not protected by the First Amendment, is a serious one, not uttered in jest, idle talk, or political argument. U.S.CONST. amend. I. A "true threat" is not protected speech. *State v. J.M.*, 144 Wn.2d 472, 28 P.3d 720 (2001). Courts have adopted an objective test of what constitutes a "true threat":

> A "true threat" is 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

> individual]." *State v. Knowles,* 91 Wash. App. 367, 373, 957 P.2d 797 (1998) (alteration in original).

State v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001).

"A true threat 'is a serious one, not uttered in jest, idle talk, or political argument.'" *State v. Hansen,* 122 Wn.2d 712, 717, FN2, 862 P.2d 117 (1993) (quoting *Howell,* 719 F.2d at 1260). Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

Officer Sneyd testified that the defendant's threat was unique. (RP 02/08/09, 18). He stated that the threats towards Officer Bowe and his family concerned him. (RP 02/08/09, 18). The threats towards him and his fellow officers concerned him. (RP 02/08/09, 18). Officer Sneyd maintained those feelings while agreeing that the defendant was drunk. (RP 02/08/09, 39). Even more alarming is that the defendant expressed thoughts about harming the officers in the future and having plans to do so. The defendant stated that

he "didn't give a fuck and that he would -- he didn't care if we were on or off duty, he would come into Denny's and he would smoke any officer he sees." (RP 02/08/09, 17). The defendant also stated that he didn't care and that he would reload if he had to. (RP 02/08/09, 17). He then threatened to kill Officer Sneyd specifically on the way to the jail. (RP 02/08/09, 17). These facts suggest that a reasonable person in Officer Sneyd's position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death. In addition, the high publicity given to the Lakewood Officers murders in Washington State on November 29, 2009, merely a week before this incident would certainly heighten a reasonable person's concern.

Cases that the defendant cites to are distinguishable from the facts in this case. In *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004), the defendant made one threat towards the

victim. In this case there were multiple threats made. Officer Sneyd testified that the defendant continued making threats about "smoking officers" on the way to the jail. (RP 02/08/09, 17). Also, in *Kilburn*. the defendant laughed after the threat was made. In this case, the defendant continued to be out of control during the entire contact. (RP 02/08/09 34).

2. The State proved Officer Sneyd was in reasonable fear that the threat would be carried out.

The defendant argues that there is insufficient evidence to establish Officer Sneyd was afraid or placed in reasonable fear that the threats would be carried out. (App. Brief at 10). This conclusion ignores all testimony given by Officer Sneyd. When asked by defense counsel during trial if Officer Sneyd was still fearful of the defendant. Sneyd stated that he was still fearful that the defendant could follow through with the threats. (RP 02/08/09, 34-35). Officer Sneyd testified that regardless of how inaccurate

the defendant may have been as to where to find him, he was still concerned that the defendant would locate him eventually. (RP 02/08/09, 34). Sneyd testified that what he was most concerned about was the defendant being released from jail. (RP 02/08/09, 34). Again, Officer Sneyd testified that he frequently deals with uncooperative subjects but that this situation was different. (RP 02/08/09, 18). He stated that the fact that the defendant was brazen enough to say the things that he did and his actions that day didn't mean that he wouldn't carry this out in the future. (RP 02/18/09, 18). What makes the defendant's actions more concerning is that he specifically threatened to shoot officers at Denny's. (RP 02/08/09, 28). The fact that he identified a location for the shooting certainly would place the victim in reasonable fear that the threat would be carried out.

A rational trier of fact, viewing the evidence in the light most favorable to the

State, could find beyond a reasonable doubt that Urbina's threats placed Officer Sneyd in reasonable fear for his personal safety.

CONCLUSION

The State contends that Urbina's conviction for Felony Harassment is supported by substantial evidence on the record. As the trial court found, the State has proved every element of the crime beyond a reasonable doubt and Mr. Urbina's conviction should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of November 2010.

ANDY MILLER
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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. AARON MALCOLM URBINA, Appellant.	NO. 288617 DECLARATION OF SERVICE

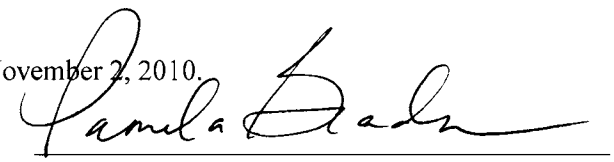
I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on November 2, 2010.

Marie Jean Trombley Attorney at Law P.O. Box 28459 Spokane, WA 99228-8459	☒ U.S. Regular Mail, Postage Prepaid ☐ Legal Messenger ☐ Facsimile
AARON MALCOLM URBINA 1730 W. NIXON STREET PASCO, WA 99301	☒ U.S. Regular Mail, Postage Prepaid ☐ Legal Messenger ☐ Facsimile

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

EXECUTED at Kennewick, Washington, on November 2, 2010.



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