

COA No. 29487-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

EDGAR ALONSO ARROYOS, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support the conviction of felony harassment.

Issue Pertaining to Assignment of Error

1. Was the State's evidence insufficient to support the conviction of felony harassment when it failed to prove a "true threat" and a "threat to kill?"

II. STATEMENT OF THE CASE

Edgar Alonso Arroyos was charged by information with one count of felony harassment, RCW 9A.46.020(1)(a)(i) and (2)(b), committed as follows:

That the said EDGAR ALONSO ARROYOS in the County of Franklin, State of Washington, on or about the 7th day of August, 2010, then and there, did knowingly and without lawful authority, did threaten to kill another, to wit: Andrew Corral, immediately or in the future, and by words or conduct placed the person threatened in reasonable fear that the threat would be carried out. (CP 43).

The defense and State stipulated that Mr. Arroyos' oral and/or written statements made on August 7, 2010, to Officer Corral of the Pasco Police Department were voluntary and not made pursuant to a custodial interrogation. (CP 32-33). Mr. Arroyos waived a jury. (CP 31).

After a bench trial, the court entered the following findings of fact:

- 1) On August 7, 2010, Andrew Corral of the Pasco Police Department contacted the defendant and another documented gang member in reference to a graffiti investigation. The defendant Edgar Arroyos was ultimately arrested for Minor in Consumption of Alcohol. The defendant was wearing blue clothing during the time of the arrest, which Officer Corral knew to be associated with the "Florescia" street gang.
- 2) During Mr. Arroyos' arrest a picture of him and other gang members were found in his pocket. Mr. Arroyos stated that the other gang members were his "family" and he "gets respect" by associating with them.
- 3) During the booking process at the Franklin County Jail the defendant complained that the Pasco Police Department were locking up all of "Florescia." Officer Corral advised the defendant that 6 or 7 people associated with Florescia were locked up for the recent "Chiawana shooting." Officer Corral further stated it was ridiculous that gunfire would erupt in the middle of a heavily populated park, where innocent people could easily have been hurt or killed. The defendant proudly stated "that's how Florescia does it" and his facial expression reinforced the belief that defendant was proud.
- 4) The defendant then became agitated and yelled "fuck a buster." Officer Corral understands "buster" to be a derogatory way to refer to police officers, as well as rival Norteno gang members. Officer Corral then yelled 'fuck Florescia.'" Officer Corral then advised the defendant that he had been cooperative earlier and to continue to be cooperative.
- 5) Corrections Officer Jeremy Jansky then removed the handcuffs from the defendant. The defendant then stated Officer Corral would see him on the streets again, and "the

next time I get locked up, who knows, it might be for shooting or stabbing somebody.” The defendant then asked Officer Corral’s name and Officer Corral provided that to him. The defendant then stated, “You’ll see me on the streets again, and you’ll know it was Florencia.” Officer Corral did not state anything further, and just stated “okay.” He then continued to book the defendant into the jail for Minor in Consumption of alcohol.

6) Officer Jeremy Jansky heard some of what occurred. Specifically, he heard the defendant say he was a cousin of Ruesga, who was recently convicted for shooting and killing a person associated with the rival Norteno gang. He also heard the defendant tell Officer Corral that he would see him on the streets again and the next time he was brought into the jail it might be for a shooting or stabbing. Officer Jansky had to secure the defendant in a holding room during the booking process because the defendant would not sit down at first, tried to use the phone without permission, and was staring at Officer Corral.

7) Officer Corral was immediately concerned about the statements the defendant made to him, but was unsure whether he could book him for Felony harassment, because the defendant didn’t make a direct threat and he had never arrested a person for Felony harassment when the threat didn’t involve that word. Officer Corral left the jail and thought about the statements made by the defendant, as well as his knowledge of recent threats made by Florencia and MPS gang members regarding shooting/killing a police officer. Officer Corral was aware of recent intelligence reports where older gang members were encouraging younger gang members to shoot a police officer. Officer Corral was aware that shortly prior to the offense date here, a juvenile was arrested for shooting someone and also for pointing a gun at a police officer. Officer Corral was also aware that the Florencia gang has access to firearms, and believed that the defendant could easily try to carry out his threat. Officer Corral felt that the defendant had threatened to kill him and if he saw him on the streets again the officer’s

safety would be in jeopardy, particularly if he was off-duty at the time.

8) When taking all of the circumstances into account and the context in which the threats were made, the statements made by the defendant placed Officer Corral in reasonable fear the threats would be carried out. This includes the defendant's pride in his gang, his admission that they are his family and that's where he gets respect. The officer's background knowledge about violence in gangs, the defendant's adoption of the gang lifestyle and disregard for rules, would reasonably place Officer Corral or any reasonable person in fear that the threats would be carried out.

9) The defendant should have reasonably foreseen that his threats would be taken seriously, and not be seen as idle talk or made in jest. The defendant was aware his comments were made in the context of a discussion regarding gangs. A reasonable person in defendant's circumstances should have known that in this context, when the person making the threat has boasted about his association with gangs, and makes the types of threats made here, that they would be taken seriously by the person threatened.

10) The threat was a threat to kill. The defendant specifically indicated he would use a knife or gun, both of which are deadly weapons, and it can be reasonably inferred that the type of harm threatened was a threat to kill. (CP 23-26).

From the findings, the court made these conclusions of law:

- 1) On or about August 7, 2010, the defendant knowingly threatened to kill Officer Andrew Corral immediately or in the future;
- 2) The words or conduct of the defendant placed Officer Corral in reasonable fear that the threat to kill would be carried out;

- 3) The threat made was a “true threat.”
- 4) The defendant acted without lawful authority; and
- 5) That the threat was made or received in Franklin County, Washington.
- 6) Defendant committed the crime of felony harassment. (CP 26).

The court sentenced Mr. Arroyos within the standard range. (CP 7-22). He appeals. (CP 5-6).

III. ARGUMENT

A. The State’s evidence was insufficient to support the conviction of felony harassment.

Mr. Arroyos does not challenge the findings of fact, as substantial evidence supports them. To the extent, however, that findings 8, 9, and 10 are mixed findings and conclusions, Mr. Arroyos challenges the court’s conclusions of law in those “findings” as well as the conclusions of law designated as such. (11/10/10 RP 61, 63-65).

With respect to finding of fact 8, the only factual finding made by the court is that “[t]his includes the defendant’s pride in his gang, his admission that they are his family and that’s where he gets respect.” (CP 27). The rest of the finding is a conclusion of law where the court determined Mr. Arroyos’ statements placed the

officer in reasonable fear the threats would be carried out” – an element of the offense in RCW 9A.46.020(1)(b).

With respect to finding of fact 9, the only factual finding made by the court is that “ [t]he defendant was aware his comments were made in the context of a discussion regarding gangs.” The remainder of the “finding” is a conclusion of law determining Mr. Arroyos should have foreseen his threats would be taken seriously, again relating to the element of the offense in RCW 9A.46.020(1)(b).

With respect to finding of fact 10, this is actually the court’s conclusion of law that Mr. Arroyos made a “threat to kill” – an element of felony harassment under RCW 9A.46.020(2)(b).

The trial court’s decision after a bench trial is reviewed for whether substantial evidence supports any challenged findings and whether the findings then support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318, *rev. denied*, 166 Wn.2d 1020 (2009). In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In a challenge to the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006).

Under RCW 9A.46.020(1)(a)(i), in order to prove that Mr. Arroyos committed the crime of harassment, the State must show:

(a) [w]ithout 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 . . .

RCW 9A.46.020(1)(b) provides that “[t]he person by words or conduct places the person threatened in reasonable fear that he threat will be carried out.”

RCW 9A.46.020(2)(b) states the requirements for deciding if the harassment committed is a felony or a gross misdemeanor:

(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person

has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (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.

The harassment statute only proscribes "true threats." *State v. Schaler*, 169 Wn.2d 274, 283-84, 236 P.3d 858 (2010). A true threat is "a statement made in a context under 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." *Id.* (quoting *State v. Williams*, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001))

The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole. *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004).

Here, Mr. Arroyos' statements to Officer Corral were indeed mere hyperbole. The officer acknowledged that any threat was implied or indirect. (10/13/10 RP 24). Mr. Arroyos was intoxicated. (*Id.* at 9-10, 19). As he was being processed, Mr. Arroyos told Officer Corral that he would see him on the streets again and the

next time he got arrested it might be for shooting or stabbing somebody. (*Id.* at 23). When the officer did not respond, Mr. Arroyos asked him his name. (*Id.*). Officer Corral gave his name, whereupon Mr. Arroyos said he would see him on the streets again and the officer would know it was Florencia. (*Id.*). That was the extent of the exchange forming the basis for the felony harassment charge.

But Mr. Arroyos made no threat, direct or indirect, against Officer Corral. All he said was that the next time he got arrested it might be for shooting or stabbing somebody. In the context of the gang evidence that came in at trial, “somebody” could have been anybody and not Officer Corral specifically. Mr. Arroyos asked him his name, but that would hardly make a difference since he obviously knew what the officer looked like and knowing his name could not make any threat more or less real. In these circumstances, Officer Corral could not have reasonably feared the threats would be carried out. (Finding of Fact 8, CP 25). Mr. Arroyos’ comments were hyperbole and trash talk, as demonstrated in the exchange between the two regarding the Chiawana Park incident. Even viewing the evidence in a light most favorable to the State, it did not prove beyond a reasonable doubt the element of

the offense that “[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)(b).

By the same token, Mr. Arroyos did not threaten the officer himself with his statements. In the context of their interaction, both were trash talking and the alleged threat could not have been taken seriously by Officer Corral. (Finding of Fact 9, CP 25). The evidence simply does not show that Mr. Arroyos had the mens rea for the offense of knowing or foreseeing that Officer Corral would reasonably fear that the threat would be carried out. *Schaler*, 169 Wn.2d at 286. Without mens rea, Mr. Arroyos was convicted on evidence less than a true threat. *Id.* at 287. The conviction cannot stand.

Noting that Mr. Arroyos indicated he would use a knife or gun, both deadly weapons, the court concluded the threat was a threat to kill. (Finding of Fact 9, CP 26). But he indicated no such thing. All Mr. Arroyos said was that the next time he got arrested, it might be for shooting or stabbing somebody. That comment could not reasonably indicate a threat to kill Officer Corral. Not all shootings and stabbings end in death. Mr. Arroyos was talking about himself being arrested and directed no threat to kill at the

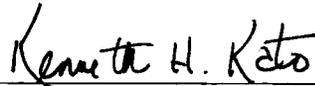
officer. Indeed, the entire exchange was trash talk and hyperbole between the officer and him. Again, even viewed in a light most favorable to the State, the context and circumstances simply do not show a threat to kill Officer Corral beyond a reasonable doubt. The State failed to prove this necessary element of felony harassment. RCW 9A.46.020(b)(ii).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Arroyos respectfully urges this Court to reverse his conviction and dismiss the charge.

DATED this 18th day of April, 2011.

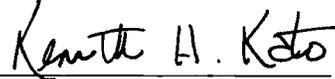
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on April 18, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on David W. Corkrum, Franklin County Prosecutor's Office, 1016 N. 4th Ave., Pasco, WA 99301, and Edgar Alonso Arroyos, 2115 9th Ave., Pasco, WA 99301.



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