

FILED

JAN 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 294871

**STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III**

STATE OF WASHINGTON,

Respondent,

vs.

EDGAR ALONSO ARROYOS,

Appellant.

**APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY**

BRIEF OF RESPONDENT

**SHAWN P. SANT
Prosecuting Attorney**

by: **Frank W. Jenny, #11591
Deputy Prosecuting Attorney**

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Pasco, WA 99301
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I. COUNTERSTATEMENT OF ISSUE

After viewing the evidence in a light most favorable to the State, could any rational trier of fact find beyond a reasonable doubt that the essential elements of the crime of felony harassment were committed by Edgar Alonso Arroyos?

II. COUNTERSTATEMENT OF THE CASE

Edgar Alonso Arroyos (hereinafter defendant) appeals his Franklin County conviction for felony harassment. (CP 5-6, 7-22). Report of proceedings (RP) citations relate to the transcript of the bench trial that occurred on October 13, 2010.

Corrections Officer Jeremy Jansky was working at the Franklin County Jail on August 7, 2010, when Officer Andrew Corral brought defendant in to be booked. (RP 9-10). Defendant showed signs of having consumed alcohol. (RP 9-10). Officer Jansky heard defendant say to Officer Corral that he was a cousin to a notorious gang member named Ruesga, that he took pride in his "family", and that the officer had better release him. (RP 11). The corrections officer also heard defendant say the next time he was arrested, it might be for a shooting or stabbing. (RP 12). When defendant was asked what he meant by that, he replied, "Take it how you will." (RP 12). Officer Corral asked defendant if

he was threatening him, and defendant replied he would find out the next time he saw him on the streets. (RP 13). There was further discussion between defendant and Officer Corral, but Officer Jansky did not recall it because he was more focused on his booking search. (RP 13).

Defendant would not sit down and was staring at Officer Corral. (RP 14). He started pacing back and forth without taking his eyes off Officer Corral. (RP 14). Officer Jansky secured defendant in a holding cell as a precaution until Officer Corral left. (RP 14). Officer Jansky's concern was based on defendant's behavior. (RP 15).

Officer Corral was on duty with the Pasco Police Department on August 7, 2010. (RP 17-18). He had taken two reports of graffiti associated with the Florencia gang near the intersection of 24th and Court in Pasco. (RP 18). While he was typing his reports, he saw three males walking about 50 feet from his patrol car; they were the defendant, Edgar Arroyos, one of his friends, Miguel Anderton, and a third male. (RP 18). The subjects were wearing blue (a Florencia color). (RP 18). Anderton displayed Florencia tattoos. (RP 18). Officer Corral was familiar with Anderton from previous contacts and was aware he is associated with the

Florencia gang. (RP 18). Officer Corral then contacted the subjects because of the Florencia graffiti in the area. (RP 18).

Officer Corral was joined by Officer Saul Mendoza in speaking with the subjects to investigate a possible connection between them and the graffiti. (RP 19). The officers noted an odor of intoxicants on defendant's breath and that his eyes were bloodshot and watery. (RP 19). It was determined he was 19 years of age. (RP 19). He was placed under arrest for being an underage person who had consumed intoxicants. (RP 19).

During a search incident to the arrest, a photograph was found in the defendant's jeans pocket. (RP 18-19). The photograph depicted the defendant and some other subjects "throwing" a Florencia gang sign. (RP 20). Officer Corral recognized four of the individuals in the photograph as Florencia gang members he knew by name. (RP 20). When asked about the photograph, defendant described the people in the picture as being more of his "family" than his biological or blood family. (RP 20). Defendant "admitted that he does claim Florencia" and stated he associates with Florencia because it is like his family and it gets him some respect. (RP 21).

After arriving at the jail sally port, defendant and Officer Corral began discussing a shooting incident involving several Florencia members that had taken place at Chiawana Park within the previous month. (RP 21). Officer Corral stated it was ridiculous that a shooting would occur 15 feet away from a playground where children were playing and at a time when 200 people were present in the park. (RP 21-22). Defendant smirked and said, "That's how Florencia does it." (RP 22).

Defendant became more verbally agitated and yelled, "Fuck a buster." (RP 22). Officer Corral took this as a reference to police because he knew the word "buster" can be used as a derogatory term for police or for a rival gang member. (RP 22). At that point, Officer Corral acknowledged he had become "pretty frustrated [himself] with the whole conversation" and yelled back, "Fuck Florencia." (RP 22).

Defendant was then walked to the booking area and the handcuffs were removed. (RP 22). Officer Corral told defendant had been cooperative initially and if he cooperated again, the booking could be completed without further incident. (RP 22-23). Defendant lowered his tone of voice somewhat at that point. (RP 23).

While defendant was being processed, he again became highly verbal. (RP 23). Defendant stated to Officer Corral, "You'll see me on the streets again," and then followed up with, "The next time I get arrested, who knows. It might be for shooting or stabbing somebody." (RP 23). Officer Corral did not respond. (RP 23). Defendant then said, "What's your name?" (RP 23). The officer replied that his name is Officer Corral. (RP 23). Defendant then stated, "Okay. Okay, I'll see you on the streets again, and you'll know it's Florencia." (RP 23). Officer Corral just said, "Okay," nodded his head, and did not respond further. (RP 24). Officer Corral took defendant's comments as a threat, especially since defendant had asked for his name. (RP 23-24).

After completing the booking and returning to his patrol area, Officer Corral continued to be bothered by defendant's comments. (RP 24). He discussed the situation with his supervisor, Corporal John Probasco. (RP 24). Corporal Probasco told Officer Corral that if he felt that he was threatened, he had authorization to book defendant for that offense. (RP 24). It is common for Officer Corral to discuss such matter with his supervisor, and he does so to make certain all of the necessary elements are present before booking someone on a felony. (RP 25). Officer Corral then returned to the

jail and booked defendant on a warrantless arrest for felony harassment. (RP 24). This occurred one-half hour to 45 minutes after the incident. (RP 25).

While Officer Corral had not had any prior contact with defendant, he was aware from intelligence reports that defendant is a Florencia member. (RP 25). He knew that defendant had been present at Lourdes Medical Center a few weeks earlier when one of his gang associates was dropped off after having been shot. (RP 25). Defendant and some other people were contacted by police outside the facility. (RP 26). Defendant then ran and threw something that Officer Zach Fairly believed was a gun. (RP 26). Defendant was caught hiding in a shed or yard. (RP 26). Police were unable to find the item he threw. (RP 26).

Officer Corral was very familiar with the Florencia street gang. (RP 26). The gang had a significant presence in the Tri-Cities within the previous year. (RP 26). Officer Corral had personally witnessed the gang's activities. (RP 26). Officer Corral had been aware on August 7, 2010, from intelligence reports of several threats made by Florencia members toward law enforcement officers. (RP 30). More senior gang members were teaching younger members that they could receive respect and

status within the gang by shooting, injuring or killing police officers. (RP 30-31). He had also been aware on that date of a then-recent incident involving Alejandro Leon, who is a member of a Florencia subset. (RP 31). An officer had attempted to place Leon under arrest for an earlier shooting. (RP 31). The officer engaged in a foot pursuit of Leon, during which Leon turned around and pointed a gun at the officer. (RP 31). This incident had occurred on June 8, 2010. (RP 32).

On August 2, 2010, Officer Corral had received a bulletin regarding Jose Contreras-Gomez, who was one of the Florencia members involved in the Chiawana Park shooting. (RP 32). Contreras-Gomez was giving propaganda to younger Florencia members "advising that the Pasco Police were pushing against Florencia and that Florencia needed to push back." (RP 32). The information indicated that the gang members were to shoot at officers. (RP 32). Contreras-Gomez had been spotted outside a police officer's home in West Richland within the previous month. (RP 32). The officer in question was off duty and working in his garage when he spotted Contreras-Gomez (whom he recognized from his tattoos) attempting to look into his residence. (RP 33).

The officer went into his house to get his handgun; he returned outside to see Contreras-Gomez running down the street. (RP 33).

Officer Corral lives in Pasco. (RP 33). There were many occasions prior to August 7, 2010, when he encountered persons whom he had previously arrested. (RP 33). He is always vigilant even when off-duty in looking for individuals who may have a grudge against him. (RP 34). On August 7, 2010, he was aware that Florencia members had access to firearms. (RP 34). The then-recent Chiawana Park shooting incident was an example of how he acquired that knowledge. (RP 34).

Asked to explain why he considered defendant's statements to be a threat, Officer Corral testified:

When he said next time he gets locked up it could be for shooting or stabbing somebody, and then directly after that asking for my name, I felt that he was implying that towards me, and also for saying twice that he was gonna see me back on the streets again. I took that as an implied threat that he wanted to take my life, as well as within the context of the intelligence from Florencia.

(RP 35). Asked if that information had any bearing on his opinion that defendant could carry out the treat, he replied:

It did because I am aware that they do have access to handguns. They have pointed them at officers. I know that they do mean business. So, I took it very seriously.

(RP 35). Officer Corral further testified that he was in fear that defendant would carry out the threat that was made to him on August 7, 2010. (RP 35). He contrasted that incident with one involving an intoxicated person participating in a bar fight, and stating to the responding officer, "Hey, I'm gonna kill you or go after your family." (RP 39). He explained:

I don't feel those [types of threats] are credible. They don't ask for my name. In those type of things I don't feel threatened. It's a big difference when this person is a documented gang member. They're asking for my name. They're making specific comments such as shooting or stabbing. There is a history with the gang that I'm very aware of on what they're capable of and what they have access to. That's the difference.

(RP 39).

Defendant did not call any witnesses or present any other evidence in his defense. (RP 41). The trial court announced its verdict as follows:

All right, in the matter of State of Washington verses Edgar Arroyos, I find that the elements of harassment have been found as follows:

That on the date indicated defendant did indeed threaten Officer Corral, at least with bodily injury. I'm gonna come back later to bodily injury verses a threat to kill, but at least certainly there's a threat of bodily injury, and that it was done knowingly.

This wasn't a single blurted out statement by a drunk fellow. Statements were repeated, and there was also a request for the officer's name so that there would be an association between the implied threat and the target of it. It was also within the context of disagreement regarding the behavior of this Florencia gang and whether or not it's appropriate to be shooting in a public park where families are gathering.

The second element, whether or not the conduct placed Officer Corral in a reasonable fear of a threat of harm, I find that as well. Again, taking all of the circumstances into account, the discussions regarding the gangs, the gang involvement of the defendant, the pride of the defendant in his gang involvement, the fact of his admission that they are family and that's where he gets respect and, therefore, that coupled with the officer's background and knowledge regarding this particular gang and its dangerous propensities and the defendant's adoption, voluntary adoption of that as a lifestyle and that as an attitude, including the willful disregard of the rule of law and the safety of the public, would make anyone have a reasonable fear of their safety when these kinds of words are uttered by someone such as the defendant.

The third element, the defendant did act without lawful authority. The fourth element, the threat occurred in the State of Washington. The constitutional element, that is whether or not a reasonable person in the position of the defendant would foresee that the statement would be interpreted as a serious expression of intent to carry out the threat rather than just idle talk or jest or political argument or some other constitutionally protected argument.

Here, because of the context, the way it came about with discussions regarding gangs, the discussion that included pride in the gang, pride in the gang's values as well as the last part of the statement, or something

to the effect that, "You'll see how the Florencia does it" or "That's the way Florencia does it," I think all of those, and he would anticipate that a police officer would be well aware of gangs in general and his gang specifically, and so a reasonable person in defendant's position would certainly believe and really expect the believer to believe that that's a serious statement, a serious intention of expression to carry out the act.

The only problem here is whether or not there was a threat to kill. The defendant never used the word kill as far as I can tell. He didn't talk about bodies or body bags or anything of that nature, but did specifically indicate the type of weapon that would be used, gun or knife, both of which are deadly weapons. Therefore, it can reasonably be inferred because the defendant specified the type of weapons, those being deadly, that there was an inferred threat to kill.

I find the defendant guilty of felony harassment.

(RP 52-54). The trial court also entered detailed written findings of fact:

(1) On August 7, 2010, Officer 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 knows to be associated with the "Florencia" street gang.

(2) During Mr. Arroyos' arrest a picture of him and other gang members was 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 was locking up all of "Florenxia." Officer Corral advised defendant that 6 or 7 people associated with Florenxia 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 Florenxia 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 Florenxia." 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 for 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 Florenxia." Officer Corral did not state anything further, and just stated "okay." He then continued to book the defendant into 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 jail it might be for a shooting or a 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 [i.e., kill]. 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 Florencio 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 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 in 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). Based on the foregoing findings of fact, the trial court entered the following 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).

III. RESPONSE TO ARGUMENT

(a) Standard of review.

The sole issue raised by defendant relates to whether the evidence presented at his bench trial was sufficient to support his conviction for felony harassment. The law in this area is well settled. On a challenge to the sufficiency of the evidence, the court must view the evidence in a light most favorable to the prosecution, and must determine whether any rational trier of fact could find the elements of the crime beyond a reasonable doubt. State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.3d 157 (2003). The court must draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. Id. The same standard applies regardless of whether the case is tried to a jury or to the court. Id. The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less trustworthy than the other. Id.

“A person is guilty of harassment if[,] [w]ithout lawful authority, the person knowingly threatens . . . to cause bodily injury

. . . in the future to the person threatened” RCW 9A.46.020(1)(a)(i). Harassment includes “words or conduct [that] places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020(1)(b). “A person who harasses another is guilty of a class C felony if . . . the person harasses another person . . . by threatening to kill the person threatened” RCW 9A.46.020(2)(b)(i) (emphasis added). Harassment differs from assault in that the latter can arise from a threat of immediate bodily harm while the former is established by a threat to cause bodily harm in the future. City of Seattle v. Allen, 80 Wn. App. 824, 831, 911 P.2d 1354 (1996).

“Mr. Arroyos does not challenge the findings of fact, as substantial evidence supports them.” Brief of Appellant, at 5. Accordingly, the findings of fact are varieties on appeal. City of Sunnyside v. Lopez, 50 Wn. App. 786, 794 n.6, 751 P.2d 313 (1988) (citing Beggs v. City of Pasco, 93 Wn.2d 682, 685, 611 P.2d 1252 (1980)). While he claims certain findings of fact are actually conclusion of law, that would have little significance even if true. Findings of fact that are actually conclusions of law are treated as conclusions of law, and vice versa. Landmark Development, Inc. v. City of Roy, 138 Wn.2d 561, 584-85 n.10, 980 P.2d 1234 (1999).

(b) A threat may be either express or implied.

For purposes of the Washington Criminal Code, a threat may be either express or implied. State v. Shcherenkov, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008). In Shcherenkov, the court noted that RCW 9A.04.110 provides that the definitions set forth in that subsection apply throughout Title 9A “unless a different meaning plainly is required[.]” Under RCW 9A.04.110(27)(a), threat “means to communicate, directly or indirectly, the intent . . . to cause bodily injury in the future to the person threatened[.]” “Definitions of both ‘indirect’ and ‘implied’ include the notion of communicating something in a way that is suggestive rather than explicit.” Shcherenkov, 146 Wn. App. at 625. The court explained:

The dictionary definitions of “indirect” include “not straightforward and open” and “not proceeding to an intended end by the most direct course or method.” WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1151 (2002). *Webster’s* definition of “imply” includes “to convey or communicate not by direct forthright statement but by allusion or reference likely to lead to natural inference.” WEBSTER’S, *supra*, at 1135.

Id. at 625 n.3. Thus, in Shcherenkov, the trial court properly instructed the jury that a criminal conviction could be based on an implied threat. Id. at 624-25.

As further observed by the federal Ninth Circuit:

There is no support for the proposition that a threat must consist of express words. Nor would the proposition make any sense or be consistent with the interpretation of threats in other contexts. A robber who points a gun at the victim and says “give me your money” makes an immediate threat of death by so doing, whether he adds the words “or I’ll kill you” or not. Likewise, someone may intimidate a witness by glaring at him, drawing his hand across his throat, and making a motion with his fingers of shooting him, without saying a word. Statutes criminalizing threats commonly say “express or implied,” doubtless because criminalizing only express and not implied threats would turn trials about threats into trials about grammar, without usefully addressing the social evil of criminal threats. Where the law just says “express,” we nonetheless have read implied threats into it; under the former guidelines enhancement for “express” threats of death during a robbery, we treated “Give me the money. I have dynamite” as “express,” even though the statement lacks any express threat to do anything with the dynamite.

United States v. Navarro, 608 F.3d 529, 533-35 (9th Cir. 2010).

(c) Defendant made a “true threat”.

Defendant does not appear to dispute that the words he spoke literally amounted to a threat to cause bodily harm in the future. Rather, he argues he did not make a “true threat.”

True threats occupy a category of unprotected speech that the State may constitutionally proscribe. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). A true threat is a statement

made in a context or under such circumstances where 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. The State has a significant interest in restricting speech that communicates a true threat, including protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur. Id. The speaker of a “true threat” need not actually intend to carry it out; it is enough that a reasonable speaker would foresee that the threat would be considered serious. Id.

While the court in Schaler reversed the conviction due to inadequate jury instructions, it nonetheless found the evidence was sufficient to support a conviction for felony harassment. Id. at 291. The defendant’s demeanor did not suggest he was joking, and the statements were made in the course of a tumultuous relationship. Id. Notably, the court found the evidence was sufficient to support a felony harassment conviction even though it was possible to interpret the defendant’s statements as either a true threat or a cry for help. Id.

By the same token, it is not necessary for this court to find the trial court's decision was the only possible conclusion to reach; it need only be found it is one that could be made by a rational fact-finder. Defendant's statements were made to an arresting officer during the course of a contentious arrest. (RP 21-24; CP 24). Defendant was agitated at the time. (RP 22; CP 24). Defendant stated, "The next time I get locked up, who knows, it might be for shooting or stabbing somebody." (RP 23; CP 24). Defendant bragged about his membership in the Florencia gang: Officer Corral reminded defendant that several people associated with Florencia had recently been arrested for a shooting at a park, and stated it was ridiculous that gunfire would erupt in the middle of a heavily populated park where innocent people could be hurt or killed; defendant proudly replied, "That's how Florencia does it." (RP 22; CP 21). Both before and after asking for Officer Corral's name, defendant stated to Officer Corral, "You'll see me on the streets again and you'll know it was Florencia." (RP 23; CP 24). Taken together, defendant's statements indicated (1) defendant would see Officer Corral on the streets again in the future; (2) when he did, Officer Corral would "know it was Florencia" (referring to that gang's record of inflicting violence including with firearms); and

(3) the next time defendant is arrested, it may be for a shooting or stabbing. Given the circumstances under which the statements were made, a reasonable speaker in defendant's position would anticipate the statements would be taken seriously. Certainly anyone invoking the name of a violent street gang to a police officer would expect the comment to be viewed in a very serious light, just as someone claiming membership in al-Qaeda would anticipate an airport screener would not consider it a joke. As stated by the trial court:

The constitutional element, that is whether or not a reasonable person in the position of the defendant would foresee that the statement would be interpreted as a serious expression of intent to carry out the threat rather than just idle talk or jest or political argument or some other constitutionally protected argument.

Here, because of the context, the way it came about with the discussions regarding gangs, the discussion that included pride in the gang, pride in the gang's values as well as the last part of the statement, or something to the effect that, "You'll see how the Florencia does it" or "That's the way Florencia does it," all of those, and he would anticipate that a police officer had stopped him because of gang graffiti investigating that, that the police officer would be well aware of gangs in general and his gang specifically, and so a reasonable person in defendant's position would certainly believe and really expect the [listener] to believe that that's a serious statement, a serious intention of expression to carry out the act.

(RP 53-54). A rational trier of fact could conclude that defendant uttered a true threat.

(d) Defendant made a threat to kill.

Further, defendant argues there was no threat to kill since a gun or knife could be used to inflict non-fatal injuries. Once again, it is not necessary that the trial court's decision be the only one possible from the evidence; it need only be one that a rational trier of fact could reach.

The statements made by defendant are similar to those in State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004). In Kilburn, the defendant was convicted of felony harassment based on the following statement: "I'm going to bring a gun to school tomorrow and shoot everybody and start with you." The defendant in Kilburn never expressly stated that death would be the intended result of shooting the people with a gun. The conviction was ultimately reversed because it was apparent from the circumstances that the defendant was joking. However, there was no suggestion that the words would not constitute a threat to kill if stated in a serious manner.

Intent to kill may be inferred from all circumstances of the case. State v. Mitchell, 65 Wn.2d 372, 374, 397 P.2d 416 (1964).

Proof that a defendant fired a weapon at a victim is a sufficient basis for finding intent to kill. Id.; State v. Hoffman, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991); State v. Elmi, 138 Wn. App. 306, 313, 156 P.3d 281 (2007). It reasonably follows that a threat to kill may be inferred from a threat to use a deadly weapon upon the person of a victim. Accordingly, the trial court properly found that defendant's words threatening to shoot or stab his future victim amounted to a threat to kill. As previously noted, a threat may be either express or implied:

"A threat of death" as used in subsection (b)(2)(f) [of U.S. Sentencing Guidelines Manual § 2B3.1], may be in the form of an oral or written statement, act, gesture, or combination thereof. Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply. For example, an oral or written demand using words such as "Give me the money or I will kill you", "Give me the money or I will pull the pin on the grenade I have in my pocket", "Give me the money or I will shoot you", "Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)", or "Give me the money or you are dead" would constitute a threat of death. The court should consider that the intent of this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.

Navarro, 608 F.3d at 534 n.17 (quoting U.S.S.G. § 2B3.1 cmt. n. 6) (emphasis added). Similarly, where a person harasses another by

threatening to kill the person threatened, RCW 9A.46.020(2)(b)(i) provides for an increased offense level (to-wit: from a gross misdemeanor to a class "C" felony). The court should consider that the intent of this provision is to make the offense more serious where offenders engage in conduct that would instill in a reasonable person, who is the victim of the offense, a fear of death. This may be accomplished by threatening to shoot or stab the person even without expressly stating that death would be the intended result.

(e) Defendant directed his threat to Officer Corral, who was placed in reasonable fear that the threat would be carried out.

The evidence also supports the trial court's conclusion that the threat was directed to Officer Corral, who was placed in reasonable fear that the threat would be carried out. In People v. Mendoza, 59 Cal. App. 4th 1333, 69 Cal. Rptr. 2d 728 (1997), a witness had provided testimony against Ronald Mendoza at a preliminary hearing. The witness was subsequently threatened by Ronald's brother, Angel Mendoza. Both Ronald and Angel were members of the Happy Town street gang. Two days after the testimony, Angel went to the home of the witness. Angel told the witness her testimony had damaged his brother's court case and

that “[h]e was going to talk to some guys from Happy Town.” Angel was charged with making a terrorist threat and dissuading a witness by force, or express or implied threat of force or violence. The witness testified at Angel’s preliminary hearing that she had become frightened by Angel’s words and believed they meant “they were going to kill me for sure” and they “were going to come back and shoot me.” Angel was subsequently convicted as charged at trial. In finding the convictions were supported by sufficient evidence, the court stated:

[T]he determination of whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just the words alone. The parties’ history can also be considered as one of the relevant circumstances.

Id., 59 Cal. App. 4th at 1340, 69 Cal. Rptr. at 732 (citation omitted).

Turning to the case before it, the court concluded:

Thus, in this case, the jury was free to interpret the words spoken from all the surrounding circumstances of the case. Appellant and [the witness] had known each other for several years. They knew each other because of their mutual membership or association in the criminal street gang Happy Town. Two days earlier [the witness] had given damaging testimony against appellant’s brother at his preliminary hearing where was charged with murdering a police officer.

[The witness] also knew appellant's brother to be a Happy Town gang member. Appellant's words informed [the witness] she had "fucked up" his brother's trial and he was going to talk to his fellow gang members. The fact [the witness] became fearful for her life implied she knew Happy Town gang members were capable of violence and would not hesitate to retaliate against her for hurting a fellow gang member and to prevent her from giving further testimony at his trial. A rational juror could reasonably find a threat to bring a person to the attention of a criminal street gang as someone who has "ratted" on a fellow gang member presents a serious danger of death or great bodily injury.

Id., 59 Cal. App. 4th at 1341, 69 Cal. Rptr. 2d at 732-33.

The same rationale applies here. There is certainly no meaningful distinction between "I'm going to talk to some guys from Happy Town" and "I'll see you on the streets again and you'll know it's Florencia." Like the defendant in Mendoza, the defendant in our case invoked the name of a well-known street gang when making his threat. Defendant not only claimed membership in Florencia, he stated the gang was his "family" and his vehicle for obtaining respect. (RP 20-21). Defendant was in possession of a photograph depicting him and several identified Florencia members making gang signs with their hands. (RP 20). Defendant expressed pride in Florencia's violent criminal activity, even when it endangered innocent children and other members of the public.

(RP 21-22). Like the victim in Mendoza, Officer Corral was aware of the gang's activities and knew its members were capable of violence. (RP 26, 30-34; CP 25). As the trial court observed:

The second element, whether or not the conduct placed Officer Corral in a reasonable fear of a threat of harm, I find that as well. Again, taking all of the circumstances into account, the discussions regarding the gangs, the gang involvement of the defendant, the pride of the defendant in his gang involvement, the fact that his admission that they are family and that's where he gets respect and, therefore, that coupled with the officer's background and knowledge regarding this particular gang and its dangerous propensities and the defendant's adoption, voluntary adoption as that as a lifestyle and that as an attitude, including the willful disregard of the rule of law and the safety of the public, would make anyone have a reasonable fear of their safety when these kind of words are uttered by someone such as the defendant.

(RP 52-53). As in Mendoza, a rational fact-finder could conclude from all the circumstances that Officer Corral was reasonably placed in fear that the threat would be carried out.

The evidence also supports the conclusion that the threat was directed at Officer Corral. Defendant continually stared at Officer Corral in a hostile manner, causing enough concern by the corrections officer that he placed defendant in a holding cell until Officer Corral left. (RP 14-15; CP 24-25). Defendant specifically asked for Officer Corral's name; both before and after doing so,

defendant told Officer Corral, "You will see me on the streets again and you will know it was Florencia" (referring to that gang's reputation for violence). (RP 23; CP 24). Defendant also effectively communicated a threat of death to Officer Corral. He stated that the next time he is arrested, it may be for a shooting or stabbing. (RP 23). If defendant did not mean to imply that Officer Corral would be the victim of the future shooting or stabbing, why would he mention shooting or stabbing in the same conversation in which he made a threat to Officer Corral? The nature of the threat was perhaps best summed up in Officer Corral's own testimony:

When he said next time he gets locked up it could be for shooting or stabbing somebody, and then directly after asking for my name, I felt that he was implying that towards me, and also for saying twice that he was gonna see me back on the streets again. I took that as an implied threat that he wanted to take my life, as well as within the context of the intelligence from Florencia.

(RP 35). Officer Corral also contrasted the instant case to one involving an intoxicated person participating in a bar fight, who states to the responding officer, "Hey, I'm gonna kill you or go after your family." Officer Corral explained:

I don't feel those [types of threats] are credible. They don't ask for my name. In those types of things I don't feel threatened. It's a big difference when this person is a documented gang member. They're asking for

my name. They're making specific comments such as shooting or stabbing. There is a history with the gang that I'm very aware of on what they're capable of and what they have access to. That's the difference.

(RP 39). The trial court obviously accepted Officer Corral's testimony:

This wasn't a single blurted out statement by a drunk fellow. Statements were repeated, and there was also a request for the officer's name so that there would be an association between the implied threat and the target of it. It was also within the context of disagreement regarding the behavior of this Florencia gang and whether or not it's appropriate to be shooting in a public park where families are gathering.

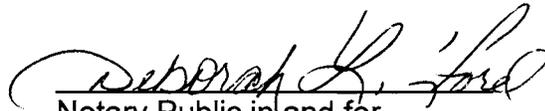
(RP 52). Notably, Officer Corral did not engage in a knee-jerk reaction and immediately book defendant for felony harassment. He did so only after contemplating the significance of defendant's statements and discussing the matter with his supervisor. (RP 24-25).

In Washington, as in California, all of the surrounding circumstances and the context in which the statements were made may be considered in determining whether a defendant's utterances constituted a threat. Schaler, 169 Wn.2d at 283. After such consideration, a rational trier of fact could reach the conclusion that the trial court did in fact make in the instant case.

2115 N. 9th Avenue, Pasco, Washington 99301 and to Kenneth H. Kato, opposing counsel, 1020 N. Washington Street, Spokane, Washington 99201 by depositing in the mail of the United States of America a properly stamped and addressed envelope.



Signed and sworn to before me this 23rd day of January, 2012.



Notary Public in and for
the State of Washington,
residing at Kennewick
My appointment expires:
May 19, 2014

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