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29865-5-III

DECEMBER 6, 2011

COURT OF APPEALS

Court of Appeals
Division III
State of Washington

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH AYALA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering finding no. 2:

The manner in which Respondent and his accomplices chased the victims intentionally created a risk of public inconvenience, annoyance, or alarm.

(CP 7)

2. The court erred in entering finding no. 4:

Co-respondent Nicolas Nunez pushed one of the victims, causing two victims to fall to the ground. The most reasonable and logical inference was that this push was an unwanted touching, and therefore it was an assault. Respondent aided and abetted Co-Respondent Nunez in that assault.

(CP 8)

3. The court erred in entering conclusion no. 1:

Respondent intentionally created a risk of public inconvenience, annoyance, or alarm.

(CP 8)

4. The court erred in entering conclusion no. 2:

Respondent's behavior toward the victims was threatening in concert with a co-respondent who physically assaulted one of the victims.

(CP 8)

5. The court erred in concluding:

Respondent is guilty of Assault in the Fourth Degree and Disorderly Conduct.

(CP 8)

B. ISSUES

1. The State presented evidence that would support the inference the defendant made insulting or possibly threatening remarks prior to chasing the alleged victims. The court's findings in support of a disorderly conduct conviction fail to disclose whether the court relied on constitutionally protected speech as the basis for finding the defendant engaged in threatening behavior. Should the matter be remanded for entry of more specific findings?
2. Following a bench trial, the court entered written findings as to the ultimate facts constituting the charged crimes but failed to state the evidence on which the court relied in reaching its decision. Should the matter be remanded for entry of more specific findings?

3. Four teen-agers were trick-or-treating on Hallowe'en. The 15-year-old defendant and his two companions, who were also trick-or-treating, chased the four young people away from his neighborhood. Is the evidence sufficient to support defendant's conviction for disorderly conduct?
4. One of the defendant's companions overtook the youths they were chasing and pushed two of them to the ground. Is the evidence sufficient to support the defendant's conviction as an accomplice to the assault?

C. STATEMENT OF THE CASE

Joey Ayala and his friends Joseph Tretheway and Nicholas Nunez, were trick-or-treating on the evening of October 31. (RP 115, 119) As they approached the home of a friend, they saw Eduardo Torres and Pedro Toscano and two young women. (RP 119) It appeared to Mr. Tretheway that the young men were throwing gang signs. (RP 121-22)

Mr. Tretheway and Mr. Nunez recognized Mr. Torres and Mr. Toscano as having been involved in a prior incident in which Mr. Ayala had been stabbed. (RP 102, 123, 135) According to Mr. Torres and his companion, Messrs. Ayala, Nunez and Tretheway were "talking smack" and "saying stuff." (RP 45, 77, 93) Mr. Ayala told them to "get outta

here” and “you don’t need to be here.” (RP 123) He and his friends then chased the four out of the neighborhood. (RP 78, 123)

Messrs. Torres and Toscano and their companions ran into a nearby home and the residents offered to call the police. (RP 81) About twenty minutes later, Officer James Vaught and Corporal Gordon Thomasson responded to the call and the four young people told Officer Vaught what had happened. (RP 13-14, 50, 68)

They declined his offer of a ride, and decided to walk home through a nearby park. (RP 13, 68) Officer Vaught offered to meet them on the other side of the park and then follow them home. (RP 13) As he approached the other side of the park, followed by Corporal Thomasson, he saw the four young people running towards him, with three others in pursuit. (RP 14, 27)

After the four young people ran past the officer, Mr. Nunez overtook Mr. Torres and pushed him. (RP 15, 36, 128) Mr. Torres and his companion fell to the ground. (RP 28) Corporal Thomasson stopped, drew his weapon, ordered everyone to the ground and handcuffed several of them. (RP 29) He and Officer Vaught interviewed the seven young people, and then arrested Messrs. Ayala, Tretheway and Nunez. (RP 33) Mr. Ayala was initially charged with a felony, later reduced to disorderly conduct and fourth degree assault. (CP 35-36, 38-39)

D. ARGUMENT

1. THE DISORDERLY CONDUCT CONVICTION MAY HAVE BEEN BASED ON CONSTITUTIONALLY PROTECTED SPEECH AND CONDUCT.

A statute or ordinance criminalizing speech is unconstitutionally overbroad under the First Amendment “if it sweeps within its prohibitions constitutionally protected free speech activities.” *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000) (quoting *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)). “Because threats are a form of pure speech, a statute criminalizing threatening language ‘must be interpreted with the commands of the First Amendment clearly in mind.’” *State v. Atkins*, 156 Wn. App. 799, 805, 236 P.3d 897, 900 (2010) (internal quotation marks omitted) quoting *State v. Tellez*, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (quoting *State v. Williams*, 144 Wn.2d 197, 207, 26 P.3d 890 (2001)).

The First Amendment and the free speech protections of article I, § 5 of the Washington Constitution extend to local ordinances. *State v. Immelt*, 2011 WL 5084574 (October 27, 2011)

The elements of disorderly conduct with which Mr. Ayala was charged are set forth in Pasco Municipal Ordinance 9.06.010 which provides in relevant part:

(1) A person is guilty of disorderly conduct if that person does, with intent to cause or recklessly create a risk of public inconvenience, annoyance or alarm:

...

(C) Engages in fighting or in violent, tumultuous, or threatening behavior; . . .

Pasco Municipal Ordinance 9.06.010.

The ordinance, on its face, does not criminalize speech, only violent or threatening behavior. There is a risk, however, that the trier of fact might consider violent or threatening speech as a form of behavior. Moreover, some forms of conduct may be construed as protected speech. *See State v. Immelt*. Accordingly, a reviewing court should determine whether the trier of fact has based a finding of violent or threatening behavior on speech or conduct protected under the First Amendment and Article I, § 5.

Here, the State presented significant evidence consisting of protected expression, including allegations of “talking smack” and the use of gang signs. In order to determine whether the trial court based its findings solely on behavior that does not enjoy constitutional protection, the reviewing court must examine the trial court’s findings of fact and

conclusions of law supporting the conviction. See *State v. Barber*, 118 Wn.2d 335, 823 P.2d 1068 (1992)

2. THE FINDINGS OF FACT ARE INSUFFICIENT TO PERMIT MEANINGFULL REVIEW OF THE DISORDERLY CONDUCT CONVICTION.

The juvenile justice system has long required findings as to the evidence relied on to support the court's findings of the ultimate facts that constitute the offense. *State v. Brown*, 30 Wn. App. 344, 350, 633 P.2d 1351 (1981) overruled on other grounds by *State v. Commodore*, 38 Wn. App. 244, 684 P.2d 1364, review denied, 103 Wn.2d 1005 (1984); JuCR 7.11(d). "It is still imperative, however, for the findings of fact in a juvenile adjudicatory hearing to include the evidence upon which the court relied in reaching its decision." 30 Wn. App. at 350.

The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

JuCR 7.11(d).

"[W]here findings are required, they must be sufficiently specific to permit meaningful review." *State v. Barber*, 118 Wn.2d at 345; quoting *In re LaBelle*, 107 Wn.2d 196, 218, 728 P.2d 138 (1986).

The purpose of the requirement of findings and conclusions is to insure the trial judge “ ‘has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.’ ” State v. Agee, 89 Wash.2d 416, 421, 573 P.2d 355 (1977), quoting Roberts v. Ross, 344 F.2d 747, 751 (3d Cir.1965).

107 Wn.2d at 219.

The court found that Mr. Ayala and his accomplices “deliberately chased the victims;” that “[t]he manner in which Respondent and his accomplices chased the victims intentionally created a risk of public inconvenience, annoyance, or alarm;” and that his “behavior towards the victims was threatening.” (CP 7) But if there is evidence in the record that supports these findings, nothing in the court’s oral comments or other findings will assist this court in identifying the evidence on which the trial court relied. The court did not identify evidence that shows Mr. Ayala intended to cause public annoyance, nor any evidence that any public annoyance occurred apart from annoyance of the specific individuals who were chased. The court did not identify the manner in which Mr. Ayala chased the alleged victims, or the nature of his threatening behavior.

Without more specific findings, this court cannot determine whether, in applying the provisions of the Pasco Ordinance to the facts in this case, the trial court predicated its finding of threatening behavior on

constitutionally protected expression. When the court's findings are inadequate, the remedy may be to remand the matter for entry of findings as to the evidentiary facts that support the court's findings as to the ultimate facts, namely the elements of the charged offense. *See State v. Barber*, 118 Wn. 2d at 345, 349.

3. THE FINDINGS OF FACT DO NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT IS GUILTY OF DISORDERLY CONDUCT.

In a case tried to the court, the appellate court engages in a three-part inquiry. *State v. Enlow*, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). The court must determine whether substantial evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Id.* And finally, the court must decide whether the conclusions of law support the judgment. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996).

The ultimate fact required to support Mr. Ayala's disorderly conduct conviction was that he engaged in threatening behavior with the intention of recklessly creating public inconvenience, annoyance or alarm. But the court did not find that Mr. Ayala chased the alleged victims in a threatening manner with the intention of recklessly creating public inconvenience, annoyance or alarm. The trial court's findings do not

support the conclusion that Mr. Ayala is guilty of disorderly conduct. *See Enlow*, 143 Wn. 2d at 467.

In every criminal prosecution, the State must prove the elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The standard of review for a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. *State v. Hepton*, 113 Wn. App. 673, 681, 54 P.3d 233 (2002).

The record does not show that Mr. Ayala chased the victims in a threatening manner or that he chased them with any intention of creating any kind of public disturbance. The disorderly conduct conviction should be reversed and dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005)

Alternatively, because the court's findings are inadequate, the remedy may be to remand the matter for entry of findings sufficient to permit meaningful review. *See State v. Barber*, 118 Wn. 2d at 345, 349.

4. THE FINDINGS DO NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT COMMITTED FOURTH DEGREE ASSAULT.

The court found that Mr. Ayala aided Mr. Nunez in assaulting Mr. Torres, and concluded he was guilty of fourth degree assault. The court's reference to accomplices in Finding of Fact No. 1 suggests that the court's conclusions rest on a theory of accomplice liability.

In order to base a conclusion of guilt on a finding of accomplice liability, the trier of fact must find that the defendant aided in the commission of the crime knowing that such aid would facilitate the commission of that particular crime. *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000)

(3) A person is an accomplice of another person in the commission of a crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it; . . .

RCW 9A.08.020. "The Legislature, therefore, intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge,' the *mens rea* of RCW 9A.08.020." *Id.*

The court did not identify evidence supporting the inference that Mr. Ayala "aided and abetted Co-Respondent Nunez in that assault."

(CP 8) Nor did the court make any finding respecting whether Mr. Ayala acted with knowledge that his actions would promote the commission of an assault on Mr. Nunez. The findings are insufficient to support the conclusion that Mr. Ayala is guilty of fourth degree assault.

The evidence showed that Mr. Ayala chased the four youths. It did not disclose any basis for finding that Mr. Ayala had any intention of shoving Mr. Torres, or that he had reason to expect Mr. Nunez to do so. The fourth degree assault conviction should be reversed and dismissed. *See State v. Smith*, 155 Wn.2d at 505. Alternatively, the matter should be remanded for entry of findings sufficient to permit meaningful review. *See State v. Barber*, 118 Wn. 2d at 345, 349.

E. CONCLUSION

The convictions should be reversed and dismissed. Alternatively, the case should be remanded for entry of additional findings.

Dated this 6th day of December, 2011.

JANET GEMBERLING, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) No. 29865-5-III
)
 vs.) CERTIFICATE
) OF MAILING
JOSEPH AYALA,)
)
 Appellant.)

I certify under penalty of perjury under the laws of the State of Washington that on December 6, 2011, I mailed copies of Appellant's Brief in this matter to:

Shawn Sant
Attorney at Law
1016 N. 4th Ave
Pasco, WA 99301

and

Joseph Ayala
8212 Langara Dr.
Pasco, WA 99301

Signed at Spokane, Washington on December 6, 2011.



Janet G. Gemberling #13489
Attorney for Appellant

