

**FILED**

**FEB 02 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 29865-5-III**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JOSEPH T. AYALA,**

**Appellant.**

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

**BRIEF OF RESPONDENT**

**SHAWN P. SANT  
Prosecuting Attorney**

**by: Kim M. Kremer, #40724  
Deputy Prosecuting Attorney**

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Pasco, WA 99301  
Phone: (509) 545-3543**

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## COUNTERSTATEMENT OF THE CASE

On October 31, 2010, Pasco Police Officer James Vaught was dispatched to a report of a burglary in Pasco, Washington. (RP 11) Officer Vaught contacted the homeowner and learned that there was no burglary. (RP 12). The homeowner reported that four juveniles ran into the home in an effort to escape people who were chasing them. Id. Officer Vaught interviewed the juveniles, and offered to give them a ride home. (RP 13). They declined, but one of them requested Officer Vaught follow them. Id. He agreed, but advised them he would meet them on the other side of the block because his patrol car would not fit on the foot path through the area. Id. Officer Vaught drove to the other end of the foot path; there, he saw the same four juveniles being chased by three others. (RP 14). Officer Vaught testified that one of the juveniles “looked terrified” and he could see they weren’t playing “a game of chase or tag[.]” (RP 15). The three chasing were “right on [the victims’] heels[.]” Id. Officer Vaught identified Appellant Joseph Ayala as one of the people chasing the four juveniles.

Franklin County Sheriff’s Corporal Gordon Thomasson responded to the area to assist Officer Vaught. (RP 27). Corporal Thomasson arrived in the area of the end of the foot path and saw

a group of people. (RP 28). He saw a person “going to the ground” and others in a “fighting stance.” Id. Corporal Thomasson contacted two of the four in the group Officer Vaught described as being chased; he recall that they we “scared, breathing heavy – like I would describe as an adrenalin rush”. (RP 41).

Daisy Rodriguez described a group of three males following her and three friends. (RP 44-46). The three were telling the group she was in that they intended to beat them up and “get back at us for something.” (RP 47-48). She advised her friends to walk away from the Appellant’s group. (RP 47). When they did, Appellant’s group chased them. (RP 48). Ms. Rodriguez and her friends ran into a nearby home. Id. After their contact with Officer Vaught, Ms. Rodriguez and her friends walked away from the area and were again chased by the Appellant and his friends. (RP 50). This scared her. (RP 51).

Luz Garcia testified that she and her friends fled after the Appellant’s group threatened to “jump” them. (RP 65). After their contact with Officer Vaught, the four encountered Appellant’s group and again ran from them. (RP 69). Eduardo Torres testified that Appellant and his friends were “talking smack” to him and his three friends. (RP 77). Mr. Torres stated that he and the other male in

the group “didn’t want no problems because we were ... with our girls[.]” (RP 78). His group started walking away, and the Appellant’s group chased them. Id. Later, the group again chased them. (RP 82). Another person in the Appellant’s group pushed Mr. Torres; he fell to the ground. (RP 82-83). Pedro Toscano testified to the same events. (RP 95, 97, 99).

Joseph Trethewey testified for the Appellant. He testified that he and his friends saw “them entering our neighborhood.” (RP 119). Mr. Trethewey stated that the other group was making gang signs with their hands. (RP 121-22). There was no physical contact between the groups at that point. (RP 122). Mr. Trethewey testified that his group “didn’t think that they should be in our neighborhood and we ... chased them[.]” (RP 123). According to Mr. Trethewey, Appellant told the others to “get outta here” and “you don’t need to be here.” Id. Mr. Trethewey described a second contact between the two groups in which he ran after Appellant. (RP 127).

Appellant testified to chasing the group the second time he encountered them because he feared one of them was armed and may injure his friend. (RP 136). Although there was testimony that about members of both groups being armed (RP 48, 67, 80, 99,

135), there was no testimony regarding any weapon being found on any of the parties.

### ARGUMENT

#### I. **THERE IS NO EVIDENCE THAT APPELLANT'S CONVICTION WAS BASED UPON CONSTITUTIONALLY PROTECTED SPEECH OR CONDUCT.**

Appellant contends that because the findings of fact and conclusions of law do not “identify the manner in which [Appellant] chased the alleged victims, or the nature of his threatening behavior[,]” this court cannot undertake a meaningful review of Appellant’s Disorderly Conduct conviction. (App.Br. 7, 8). This argument ignores settled law regarding findings of fact and conclusions of law.

#### A. **FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT THE ONLY FACTOR THIS COURT WILL CONSIDER.**

Findings of fact do not stand alone. “[W]e do not review the court's findings of fact alone in reviewing an insufficient evidence claim. We review the entire record to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Gatlin, 158 Wn. App. 126, 130-31, 241 P.3d 443, 446 (2010).

B. THE TRIAL TRANSCRIPT  
DEMONSTRATES APPELLANT  
ENGAGED IN CONDUCT NOT  
PROTECTED BY THE FIRST  
AMENDMENT.

A wide variety of physical activities have been described as expressive conduct. See Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); Kev, Inc. v. Kitsap County, 793 F.2d 1053 (1986) (nude dancing); U.S. v. Grace, 461 U.S. 171 (1983) (picketing); Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in protesting segregation). Not every physical act is expressive conduct. City of Seattle v. McConahy, 86 Wn.App. 557, 937 P.2d 1133 (1997) (review denied, 133 Wn.2d 1018) (sitting on a sidewalk in violation of local ordinance).

To fall under the First Amendment's protections, the Appellant's conduct must be "intend[ed] to communicate a message [that] can be understood in context." State v. Immelt, 173 Wn.2d 1, 2, \_\_\_ P.3d \_\_\_ (2011). While there is no doubt Appellant intended to convey a message to the victims – he "didn't think that they should be in [his] neighborhood" – the State is unaware of any support for the proposition that chasing a person down the street is protected expressive conduct. (RP 123).

At trial, all four victims described Appellant chasing them. (RP 47, 66, 78, 99). A responding officer described seeing the four victims being chased (RP 14), and that one of them “looked terrified[,]” (RP 15). Both defense witness described Appellant chasing the victims. (RP 128, 136). This conduct, along with Appellant’s verbal challenges to the victims to “get outta here” (RP 123) and that his group would “jump” them (RP 65), falls squarely under true threats not protected by the First Amendment, Virginia v. Black, 538 U.S. 343 (2003). In Black, the Supreme Court described a true threat as one by which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” 538 U.S. at 359. It is evident by Appellant’s conduct that he intended to communicate a true threat to the victims. That conduct deserves no First Amendment protection. There was no need for the trial court to make specific findings that its conclusions were not based upon constitutionally protected speech or conduct.

**II. THERE IS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT’S DISORDERLY CONDUCT CONVICTION.**

Appellant argues that the findings do not support his Disorderly Conduct conviction because the trial court did not

specifically find that he “chased the victims in a threatening manner with the intention of recklessly creating public inconvenience, annoyance or alarm.” (App. Br. 9). As noted above, the Findings of Fact and Conclusions of Law are not the only factor this Court will consider. The record shows that Appellant did not believe the victims belonged in his neighborhood, he threatened them, and he chased them. One of the victims testified that this scared her. (RP 51). A responding law enforcement officer noted that what he observed between the parties did not appear to be a game of tag. (RP 15).

A. IF THIS COURT FINDS THE  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
DEFECTIVE, REMAND, NOT  
DISMISSAL, IS THE  
APPROPRIATE REMEDY.

Appellant asks this Court to dismiss his Disorderly Conduct conviction with prejudice. Dismissal is an extreme remedy. State v. Iniguez, 167 Wn.2d 273, 295, 217 P.3d 768, 779 (2009) (where the court found that an eight-month delay in bringing an incarcerated defendant to trial was not of a sufficient constitutional magnitude to warrant dismissal with prejudice). His argument assumes that there was insufficient evidence to support his

conviction; however, as described above, this argument is without merit. Assuming, *arguendo*, that the Findings of Fact and Conclusions of Law are defective, it would be improper to dismiss this case solely on that basis. St. v. Alvarez, 128 Wn.2d. 1, 904 P.2d 754 (1995).

In Alvarez, that appellant was charged with harassment. 128 Wn.2d at 10, 904 P.2d at 759. On appeal, he argued the trial court's findings of fact and conclusions of law did "not contain ultimate facts sufficient to support his conviction." Id. Our supreme court agreed that the findings of fact failed to meet the requirements because "[t]hey did not in specific words state that Appellant Alvarez by words or conduct made threats which placed his victims in reasonable fear that the threat would be carried out, a necessary element of the offense ... as charged." 128 Wn.2d at 17, 904 P.2d at 763 (interior quotations omitted). The court affirmed the Court of Appeal's ruling that the proper remedy was remand, as it was "apparent from the record that the trial court's not entering findings of *ultimate* facts was not because the State had not met its burden of proof. It was instead simply the choice of words used in the findings of fact." 128 Wn. 2d at 19, 904 P.2d at 764 (emphasis in original).

There, as here, the trial court heard sufficient evidence to find Appellant guilty. *Id.* “Trial judges are presumed to know the law and to apply it in making their decisions.” Walton v. Arizona, 497 U.S. 639, 653 (1990) *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584, (2002). The evidence heard by the trial court was sufficient for a rational trier of fact to find Appellant guilty.

**III. THERE IS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT’S ASSAULT IN THE FOURTH DEGREE CONVICTION.**

Appellant also argues that the findings do not support his conviction for Assault in the Fourth Degree. Again, this Court will consider more than just the Findings of Fact and Conclusions of Law. There is ample evidence in the record showing that Appellant acted in accord with the co-defendant who actually pushed one of the victims.

A person acts as an accomplice when he or she “aids [another] person in planning or committing” a crime. RCW 9A.08.080(3)(a)(i). Our supreme court has previously stated that:

“The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some

other way, he is a participant. The elements of the crime remain the same.”

State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731, 736 (1974) disapproved of by State v. Harris, 102 Wash. 2d 148, 685 P.2d 584 (1984.).

Had Appellant simply been standing by when his co-defendant pushed the victim, his mere presence would not have been sufficient to form accomplice liability. That is not what happened. Appellant chased the victims down the street. The Appellant’s group thought the victims didn’t belong in their neighborhood. Appellant’s group threatened the victims. Each of these acts aided co-defendant Nicholas Nuñez in the assault.

Additionally, the State is unaware of any legal support for the position that a trier of fact must make a specific finding of accomplice liability. Although a jury must be instructed on accomplice liability, State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213, 1218 (1984), this was not a jury trial. This Court should presume the trial court knew the law regarding the accomplice liability and applied it appropriately. Walton, 497 U.S. at 653.

CONCLUSION

Findings of Fact and Conclusions of Law do not stand in a vacuum, and they are not the only factor this Court will consider. When viewed as a whole, the record demonstrates there was sufficient evidence before the trial court to find Appellant guilty of Disorderly Conduct and Assault in the Fourth Degree. The State respectfully requests this court affirm those convictions.

Dated this 1st day of February, 2012.

Respectfully submitted,

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