

FILED

30653-4-III

AUG 16 2012

COURT OF APPEALS

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RUDY CORDOVA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Mr. Cordova of felony harassment without sufficient evidence that the alleged victim was placed in actual reasonable fear that the death threat would be carried out.
2. The trial court erred by denying Mr. Cordova's motion to dismiss the felony harassment charge for lack of evidence.
3. The trial court abused its discretion by admitting Officer McMurtrey's testimony that he was told by dispatch that Mr. Cordova was coded "officer caution and was an armed criminal."

II.

ISSUES PRESENTED

- A. DOES THE "TRUE THREAT" DEFINITION USE AN OBJECTIVE STANDARD OR A SUBJECTIVE STANDARD?
- B. HAS THE DEFENDANT SHOWN THAT THE ADMISSION OF THE "T-3" AND "ARMED CRIMINAL" DESIGNATIONS RELATED BY POLICE DISPATCH WAS NOT HARMLESS ERROR?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts much of the defendant's version of the Statement of the Case. However, the State does not agree with the following facts:

The defendant portrays himself as behaving calmly. Brf. of App. at pg. 3. At one point, the defendant claims that he never became physically aggressive with the officers. Brf. of App. at pg. 3. This claim is blatantly incorrect. According to Ofc. McMurtrey's testimony, the defendant "...was getting angrier, he started – he started gesturing and showing me more of an aggressive physical posture." RP 234.

The defendant swore at Officer McMurtrey. RP 235. Officer McMurtrey felt the situation was escalating to an imminent assault so he called Officer Widhalm back. A third police officer was already on the way to take photos, so Officer McMurtrey elected to wait for the third officer prior to arresting the defendant. RP 236.

When Ofc. McMurtrey attempted to put the defendant in the patrol car, the defendant refused to obey commands. RP 239.

The facts indicate a very tense situation caused by the defendant.

IV.

ARGUMENT

A. THE DEFENDANT MISCONSTRUES THE LAW AND ATTEMPTS TO INSERT A SUBJECTIVE TEST INTO THE OBJECTIVE THREAT LANGUAGE.

Washington State uses an objective standard for evaluating threats. *State v. Ballew*, 167 Wn. App. 359, 272 P.3d 925 (2012). The defendant claims that there was insufficient evidence to show that Deputy McMurtrey had an actual “reasonable fear that the defendant’s death threat would be carried out. This claim completely misrepresents the law of Washington State.

The Washington State Supreme Court in *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004) stated: “[w]e have adopted an objective test of what constitutes a ‘true threat’ based upon how a reasonable person would foresee the statement would be interpreted.” *Id.* at 43.

Once the State presents sufficient evidence of a “true threat”, the issue goes to the jury.

Ofc. Holton Widhalm testified that he was very worried that the defendant would try to kill him. RP 223.

Officer Christopher McMurtrey testified that he received information from dispatch that the defendant was listed as a “Temperament Code 3” which means officer safety caution. RP 227. The officer also received information that the defendant was listed as an armed criminal.

After investigating the victim's situation, Ofc. McMurtrey approached the defendant and noticed a strong odor of intoxicant coming from the defendant. RP 230. The defendant's speech was slurred and repetitive with watery and droopy eyes. Ofc. McMurtrey concluded that the defendant was intoxicated. RP 230.

After being arrested and while on the way to the police car, the defendant asked Officer McMurtrey his name. The defendant then stated: "That's how people die right there." RP 237. The defendant said the words twice. RP 237. The defendant then stated, "that's how people die, by taking the wrong people to jail." "You don't have shit on me. Don't worry, I'll get out of jail tomorrow and find out where you guys live." "I've been to prison." RP 238.

Officer McMurtrey testified that it wasn't a joking situation. RP 238. The defendant's tone was cold and deliberate. RP 238. Officer McMurtrey testified that the defendant's threat concerned him. RP 238. Officer McMurtrey noted that he had been a police officer for five years at that point and was a "little bit aghast" at the direct nature of the threat. RP 238. Officer McMurtrey noted that he was concerned because in the computer age it is easy to find out where people live. RP 239.

When Officer McMurtrey attempted to place the defendant in the patrol car, the defendant refused to cooperate and made aggressive physical moves. RP 240.

The nature of the threat combined with the fact that two separate police officers felt concern over the threat indicates that the evidence for a “true threat” was present. The trial court correctly allowed the testimony to go to the jury. The additional data was in the nature of “context” information and was circumstantial evidence that the jury could use to evaluate the context in which the threat was made and the circumstantial reasons why the officers might have had concerns. Certainly, the jury could use the dispatch information given to Officer McMurtrey to form their decision on whether the officer was reasonable in his concerns about the defendant.

The defendant argues on appeal that the State had to prove the victim was placed in reasonable fear by the threat. That is not what the Washington State Supreme Court has stated. *Kilburn, supra*. In any event the testimony of concerns from two officers, plus the defendant’s past behavior formed sufficient evidence to submit the question to the jury.

B. EVEN IF THE ADMISSION OF THE INFORMATION FROM DISPATCH WAS IMPROPERLY ADMITTED UNDER ER 404(b), ANY ERROR WAS HARMLESS.

An error which is not of constitutional magnitude, such as the erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). Improper admission

of evidence constitutes harmless error if the evidence is of minor significance when compared with the evidence as a whole. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). In other words, the inquiry is whether the outcome of the trial would have been different if the error had not occurred. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). In this case the jury was instructed on the use of the contested data. RP 316 -16? At best, the contested data applied to the knowledge in the possession of the officer.

The trial court's admission of the police dispatch data could not have changed the outcome of this case.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 16th day of August, 2012.

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STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 30653-4-III
v.)	
)	CERTIFICATE OF MAILING
RUDY CORDOVA,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on August 16, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Eric J. Nielsen
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8/16/2012
(Date)

Spokane, WA
(Place)

Eric J. Nielsen
(Signature)