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THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

KEITH BRIER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Keith Brier has no history of violence, no desire to commit violent acts, and no intent to threaten anyone. The statements he posted were offensive, but not criminal. The First Amendment protects speech even if it is vehement, caustic, or hyperbolic. Context is critical, and Mr. Brier's statements were part of a critique of police practices posted to the "Rants and Raves" section of Craigslist. His posts were constitutionally protected speech, not true threats.

The State's response is fatally flawed because it addresses only the words used and not the surrounding circumstances. Because this Court, the Washington Supreme Court, and the U.S. Supreme Court have all emphasized the importance of context, the State's argument fails.

The State also presented insufficient evidence to prove the statutory elements of the crime. The response brief disagrees, but discusses an inapposite case instead of addressing the controlling case. These errors and others constitute independent bases for reversing the conviction.

B. ARGUMENT IN REPLY

1. The State failed to prove every element of the crime charged.

a. The State failed to prove an officer feared death, and the response brief does not address the controlling case.

As explained in the opening brief, the State proved only the level of fear required for *misdemeanor* harassment. A conviction for *felony* harassment cannot be sustained unless the State proves the alleged victim specifically feared death. *State v. C.G.*, 150 Wn.2d 604, 607-08, 80 P.3d 594 (2003); RCW 9A.46.020. Here, the only evidence presented was that the people who read the post were "concerned" about the "safety" of law enforcement officers. RP (3/2/15) 14, 18, 21. There was no testimony or other evidence that anyone feared *death*. Thus, the conviction for felony harassment should be reversed and the charge dismissed. Br. of Appellant at 17-19.

In response, the State fails to address *C.G.*, which is the dispositive case. Instead it avers that *Trey M.* controls. Br. of Respondent at 4 (citing *State v. Trey M.*, 186 Wn.2d 884, 905, 383 P.3d 474 (2016)). The State is wrong.

The main issue in *Trey M.* was the minimum *mens rea* required to prove a "true threat" consistent with the First Amendment, and the Court conducted an extensive analysis of this issue. *Trey M.*, 186 Wn.2d at 888, 892-904. It also briefly addressed other arguments not relevant here. The appellant raised a sufficiency challenge on the statutory elements, but *not* the same challenge Mr. Brier makes here. The petitioner in *Trey M.* never argued that the alleged victims feared harm but not death. Instead, he argued that the alleged victims feared what might have happened in the past rather than what would happen in the future. The Court rejected this argument, noting that the alleged victims all testified that they were "scared." *Id.* at 905. *Trey M.* is inapposite.

The controlling case, which the State fails to address, is *C.G.*, 150 Wn.2d at 606-10. There, the defendant yelled obscenities and told the alleged victim, "I'll kill you Mr. Haney, I'll kill you." *C.G.*, 150 Wn.2d at 606-07. At trial, the alleged victim "testified that C.G.'s threat caused him concern" because "she might try to harm him[.]" *Id.* at 607.

The defendant was convicted of felony harassment, but the Supreme Court reversed. Even though the defendant said she would kill the victim and even though the victim said he was concerned he would be harmed, this was insufficient to prove the *specific* type of fear required for felony harassment – namely, fear of death. *C.G.*, 150 Wn.2d at 610.

The same is true here. As in *C.G.*, the witnesses expressed "concern" about general harm ("safety"). But the felony harassment statute requires more. *C.G.*, 150 Wn.2d at 606-07, 610. Accordingly, this Court should reverse the conviction and remand for dismissal of the charge. Br. of Appellant at 17-19.

b. <u>The State failed to prove a particular victim, as required by the statute, and the statute is not "absurd"</u>.

Another independent basis for reversal is the State's failure to prove a particular victim. Contrary to the trial court's ruling, the statute uses the singular word "person," so it is not enough to prove a threat against a generic group. Br. of Appellant at 19-21 (citing, *inter alia*, RCW 9A.46.020;

RCW 9A.28.040; RCW 9A.83.030; RCW 9A.88.150; *State v. Slattum,* 173 Wn. App. 640, 656, 295 P.3d 788 (2013)).

The State acknowledges the statutory text, but claims it would be "absurd" to comply with its plain language. Br. of Respondent at 6-8. Notably, the State does not cite a single case in which the prosecution failed to identify a victim, even though the appellate reports include numerous harassment cases.[1] It is not possible to prosecute a harassment charge without a specific victim, because the State must prove the victim feared the threat would be carried out. RCW 9A.46.020(b); *C.G.*, 150 Wn.2d at 610.[2]

---

[1] *E.g. State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016); *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004); *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003); *State v. J.M.*, 144 Wn.2d 472, 28 P.3d 720 (2001); *State v. Vidales Morales*, 174 Wn. App. 370, 298 P.3d 791 (2013).

[2] As this Court explained in *Vidales Morales*, each harassment charge has at least one victim, but may have more than one. *Vidales Morales,* 174 Wn. App. at 377-81. The "person threatened" is the target of the intimidation (generally the listener or reader), and that person may or may not be the same person as the target of the violence. *See id.* Typically the target of the violence hears about the statement either directly or indirectly, and the State alleges a single victim who is both the target and "the person threatened." The State must identify that person because it most prove that person learned of the alleged threat and feared it would be carried out. RCW 9A.46.020(b).

Thus, in the State's hypotheticals where a defendant either shouts an alleged threat into a crowded room or uses social media, without question the State would be required to identify one or more victims. *See* Br. of Respondent at 7-8. The State would have to do so in order to interview the alleged victim[s], ascertain what they heard or read, determine whether they feared the alleged threat would be carried out, and call them to testify at trial to prove their fear of harm. RCW 9A.46.020. But here, the State failed to prove the identity of "the person threatened," and this failure constitutes an independent basis for reversal and dismissal. Br. of Appellant at 19-21.

2. Mr. Brier's post was constitutionally protected speech, not a true threat, and the State wrongly fails to account for the context.

Not only did the State fail to prove the statutory elements, it also failed to prove Mr. Brier issued a "true threat" falling outside the protection of the First Amendment. Mr. Brier posted his frustrations to the "Rants and Raves" section of Craigslist, complained about income inequality and police abuses, and explained that he was "angry" and

"venting" when he posted the offensive content. His statements were protected political hyperbole, not a true threat. Br. of Appellant at 21-27 (citing, *inter alia,* U.S. Const. amend. I; *Virginia v. Black,* 538 U.S. 343, 367, 123 S. Ct. 1536, 155 L. Ed.2d 535 (2003); *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed.2d 664 (1969); *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004)).

In response, the State correctly notes that the language Mr. Brier used was facially threatening. Br. of Respondent at 5-6. But that does not end the inquiry. Whether a statement is a true threat "depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." *C.G.*, 150 Wn.2d at 611.

Because context is critical, the Supreme Court reversed a harassment conviction even where the defendant said, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you," and "There's nothing an AK-47 wouldn't solve." *Kilburn*, 151 Wn.2d at 38-39. The listener originally thought the defendant might have been joking, but

"the more she thought about it the more she became afraid that Kilburn was serious." *Id.* at 39. Despite the defendant's direct statements of intention to harm others and the classmate's increasing fear, the Supreme Court reversed for insufficient evidence of a true threat because the defendant was "half smiling" when he said he was going to shoot everyone, and he began giggling after making the statement. *Id.* at 52. Also, the defendant and the alleged victim had known each other for two years and the defendant had always treated her nicely. *Id.* Thus, even though the defendant explicitly stated that he was going to shoot the alleged victim, there was insufficient evidence of a true threat. *Id.* at 54.

Similarly here, context is critical. Mr. Brier posted his statements to the "Rants and Raves" section of Craigslist, which by definition is an outlet for expressing frustrations. *See* http://www.dictionary.com/browse/rant-and-rave ("rant and rave" means "Talk loudly and vehemently, especially in anger"); https://kpr.craigslist.org/i/personals?category=rnr ("By clicking the link below you confirm that you are 18 or

older and understand 'rants and raves' may include offensive content."). He made the statements in the context of a broader discussion about police abuses, and later explained he was just "venting" and would not expect anyone to take statements in the Craigslist forum as threats. CP 36; Ex. 5.

The First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts,* 394 U.S. at 708. Mr. Brier's post was protected speech, not a true threat. Br. of Appellant at 21-27. For this reason, too, the conviction should be reversed and the charge dismissed with prejudice.

3. The information is constitutionally deficient, and the State's response is conclusory.

As explained in the opening brief, the information in this case is constitutionally deficient in several respects: It omits a critical clause of the statute, is framed in the present tense, does not identify either "the victim" or "the person threatened," and uses the phrase "the person" to refer to both the defendant and the victim. CP 1. In total, it is "gobbledygook." *Seattle v. Termain*, 124 Wn. App. 798, 806, 103 P.3d 209 (2004). The remedy is reversal and remand for

dismissal of the charge without prejudice to the State's ability to refile. Br. of Appellant at 27-31 (citing, *inter alia*, RCW 9A.46.020; *State v. McCarty*, 140 Wn.2d 420, 425-28, 998 P.2d 296 (2000); *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991) *Termain*, 124 Wn. App. at 806; WPIC 36.07.02).

The State does not address the omission of a critical clause, the present-tense problem, or the use of "the person" to mean both the victim and the defendant. *See* Br. of Appellant at 29-31. Its only response to these errors is a conclusory statement that "using common sense, the information fairly and plainly indicates that the defendant is charged with harassment based on his knowingly threatening to kill a person who reasonably believes the threat would be carried out." Br. of Respondent at 6. The information does not say this, and the State's insistence that it is clear does not make it so.

The document itself discloses the deficiencies:

> That the said Keith Eric Brier in the County of Benton, State of Washington, on or about the 26th day of May, 2014, in violation of RCW 9A.46.020 (1)(a)(i) and (2)(b)(ii) without

> lawful authority, knowingly threatens to cause bodily injury immediately or in the future by threatening to kill the person or any other person and the person by words or conduct places the victim in reasonable fear that the threat will be carried out, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

CP 1.

As a point of contrast, the pattern instruction for the crime clearly sets forth the elements:

> **WPIC 36.07.02 Harassment—Felony—Threat to Kill—Elements**
>
> To convict the defendant of the crime of [felony] harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about (date), the defendant knowingly threatened to kill (name of person) immediately or in the future;
>
> (2) That the words or conduct of the defendant placed (name of person) in reasonable fear that the threat to kill would be carried out;
>
> (3) That the defendant acted without lawful authority; and
>
> (4) That the threat was made or received in the State of Washington.

WPIC 36.07.02.

Even assuming the given name of the victim is not an element, there must be some identifier and that identifier may not conflate the defendant and the victim. The information here did not even allege that Mr. Brier threatened to kill "an officer" – the active clause omitted the target altogether. The next clause used the phrase "the person" to refer to both Mr. Brier and the victim. The entire allegation was nonsensically framed in the present tense. In total the information was constitutionally deficient, providing another independent basis for reversal. Br. of Appellant at 27-31.

4. Mr. Brier was unconstitutionally convicted of a crime not charged, and the State disregards the testimony.

Finally, Mr. Brier was unconstitutionally convicted of a crime not charged because the information had been construed to allege the Kennewick Police as the victim but the judge convicted Mr. Brier after hearing testimony that the victim could be any law enforcement officer in North America. Br. of Appellant at 32-35 (citing, *inter alia*, RP (11/21/14) 21-22; *State v. Winings*, 126 Wn. App. 75, 84,

107 P.3d 141 (2005); RP (3/2/15) 63-64; *Vidales Morales*, 174 Wn. App. at 382-84). Contrary to the State's claim, the trial judge did not limit his findings to "law enforcement officers in the Tri-Cities area." Br. of Respondent at 8. *See* RP (3/2/15) 84-86. Accordingly, this Court should reverse the conviction and remand for a new trial.

C. CONCLUSION

Mr. Brier's post to the Rants and Raves section of Craigslist was constitutionally protected speech, not a true threat. Furthermore, the State failed to prove the statutory elements, the information was constitutionally deficient, and Mr. Brier was convicted of a crime not charged. For each of these independent reasons, the conviction should be reversed.

Respectfully submitted this 20th day of November, 2017.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 34635-8-III
	)	
KEITH BRIER,	)	
	)	
APPELLANT.	)	

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