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No. 36626-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Carlos Thiede,

Appellant.

Grant County Superior Court Cause No. 17-1-00468-8

The Honorable Judge David G. Estudillo

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Thiede's conviction in Count Two violated his Fourteenth Amendment right to due process.
2. The State failed to prove the essential elements of felony harassment in count two.
3. The State failed to prove beyond a reasonable doubt that S.R. subjectively feared that Mr. Thiede would carry out threats to kill her.

ISSUE 1: A conviction for felony harassment requires proof that the threatened person feared that the threat to kill would be carried out. Did the prosecution fail to prove that S.R. subjectively feared that Mr. Thiede would carry out threats to kill her?

4. Mr. Thiede was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Mr. Thiede's attorney provided ineffective assistance of counsel by failing to properly investigate the case.
6. Defense counsel provided ineffective assistance by failing to review the discovery provided by the State prior to trial.

ISSUE 2: Defense counsel provides ineffective assistance by failing to conduct a reasonable investigation. Was Mr. Thiede deprived of the effective assistance of counsel by his attorney's failure to review the discovery prior to trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The State charged 21 year old Carlos Thiede with three counts of felony harassment, based on electronic and phone communications. CP 3-4. Mr. Thiede's family hired a local attorney to represent him. Notice of Appearance filed 7/28/17, Supp. CP. The charges were filed in July of 2017, the case went to trial in mid-January of 2019. RP 3.

In the lead-up to trial, the defense attorney explained his theory of the case: "Our theory is that this phone was stolen, and some other people were using it." RP (7/16/18) 10.

The prosecutor provided a disc of discovery materials to the defense prior to trial, and that disk included a file with a recording of one of the alleged threats. RP (1/16/19) 79, 99; RP (1/17/19) 113-115.

Multiple witnesses were prepared to testify that they knew Mr. Thiede's voice and it was him on the recording. RP (1/16/19) 79; RP (1/17/19) 103-135, 145-146, 205-206, 230-231.

But the defense attorney didn't review the file. RP (1/16/19) 82-86; RP (1/17/19) 113-115.

Not knowing what was contained there, he prepared and presented his defense. As he claimed all along, the defense theory was that the State did not adequately investigate the case since they could not prove who

possessed the phone when the messages and calls were made. RP (7/16/18) 9-17; RP (1/17/19) 157-296; RP (1/18/19) 345-353.

When S.R. testified that her friend A.R. recorded the call with her own phone as the two spoke, the defense attorney objected. RP (1/16/19) 56-58, 82-98. The attorney claimed he had received no discovery about the call. RP (1/16/19) 82-98. S.R. was prepared to identify with certainty Mr. Thiede's voice on the recording (which she later did). RP (1/16/19) 91-98; RP (1/17/19) 135.

The next morning, the defense attorney acknowledged that the State had given him the recording, and that he had not reviewed it. RP (1/17/219) 113-115.

The attorney did not ask for a recess, or continuance, or mistrial. He simply withdrew his objection to the admission of the recording. RP (1/17/19) 113-115. The trial went on, still with the defense claim that the State had not adequately investigated the case. RP (1/17/19) 157-296; RP (1/18/19) 345-353.

Three teen girls testified, claiming that Carlos Thiede threatened them with death over the phone or electronic communications. RP (1/16/19) 51-107; RP (1/17/19) 139-176, 188-247.

One of them, S.R. did not claim to be frightened by the alleged threat.¹ On this topic, she testified as follows:

Q. And was she -- so why did you decide to show your parents -- or your grandparents, excuse me.

A. I was only 14, so it was a little bit strange for a 20-year-old man to be texting me.

Q. Were you concerned about these threats?

A. Yes.

RP (1/16/19) 66.

The defense asked more about the claimed threats and her fear, and she said, “I wasn’t – I would say that I was affected by him, but I was going to be calling the police in the morning, either way.” RP (1/16/19) 73.

The defense attorney continued with his original theory that the phone had been stolen, even though all witnesses who were asked identified his voice on the recorded call containing the threat. RP (1/16/19) 79; RP (1/17/19) 103-135, 145-146, 205-206, 230-231. The case proceeded to verdict without a defense motion to recess or continue based on the attorney’s failure to review discovery. RP (1/17/19) 116-296; RP (1/18/19) 307-353.

Mr. Thiede had no criminal history and was sentenced as a first time offender. CP 35-54. He timely appealed. CP 61-81.

¹ S.R.’s claims formed the basis for Count Two. CP 3-4.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE FELONY HARASSMENT AS CHARGED IN COUNT TWO.

In Count Two, Mr. Thiede was charged with threatening to kill S.R. However, she never testified that she feared the threat would be carried out. Because of this, the evidence was insufficient to prove felony harassment. The conviction in Count Two must be reversed and the charge dismissed with prejudice.

Due process requires the State to prove beyond a reasonable doubt all facts necessary for conviction.² *State v. W.R., Jr.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Although a sufficiency challenge admits the truth of the State's evidence and all reasonable inferences that can be drawn from it,³ the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). To prove even a *prima facie* case, the State's evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *See State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006) (addressing *prima facie* evidence for *corpus delicti*).

Here, the State failed to prove the offense charged in Count Two.

² A challenge to the sufficiency of the evidence may always be raised for the first time on review. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012); RAP 2.5(a)(2) and (3).

³ *See State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

A conviction for felony harassment requires proof the accused person knowingly threatened to kill another person, and by words or conduct placed her “in reasonable fear that the threat [would] be carried out.”⁴ RCW 9A.46.020; *see also* CP 27. The person threatened “must subjectively feel fear.” *State v. E.J.Y.*, 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

The prosecution failed to meet this burden because it did not introduce evidence that S.R. subjectively felt fear that Mr. Thiede would carry out a threat to kill her.

S.R. never testified that she feared Mr. Thiede would act on any threats.⁵ Instead, during her testimony, she said she found it “a little bit strange for a 20-year-old man to be texting [her],” and that she was “concerned” and told her grandparents about the threats. RP (1/16/19) 66. Later in her testimony (when asked about possible gang involvement) she said “I wasn’t—I would say that I was affected by him, but I was going to be calling the police in the morning, either way.” RP (1/16/19) 73.

Nothing in her testimony showed that she was afraid he’d carry out any threats to kill her. In fact, she never even said that she feared bodily

⁴ Where felony harassment is charged, a generic fear of bodily harm is insufficient; the person must fear that the threat to kill will be carried out. *State v. C.G.*, 150 Wn.2d 604, 607, 80 P.3d 594 (2003).

⁵ In fact, she messaged Mr. Thiede that she *wasn’t* afraid of him. RP (1/16/19) 72; Ex. 4, Supp. CP.

harm. Accordingly, the evidence was insufficient to convict Mr. Thiede of felony harassment in Count Two. *C.G.*, 150 Wn.2d at 610-612.

Mr. Thiede's conviction in Count Two must be reversed. *Id.* The charge must be dismissed with prejudice. *See State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016); *In re Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012).

II. MR. THIEDE WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Thiede's phone was stolen in December of 2016. RP (1/17/19) 290-291. Defense counsel planned to use this fact to argue that someone other than his client had accessed Mr. Thiede's accounts to send threatening messages.

Having failed to review the discovery, defense counsel was unaware that police had recordings of telephonic threats. Counsel's failure to familiarize himself with the evidence deprived Mr. Thiede of the effective assistance of counsel. The convictions must be reversed, and the case remanded for a new trial.

The right to counsel includes the right to the effective assistance of counsel.⁶ U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Thiede was denied effective assistance by his attorney's failure to review the discovery prior to trial.

To be effective, defense counsel must conduct an adequate investigation. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Investigating the facts is "an essential duty." *State v. Visitacion*, 55 Wn. App. 166, 174, 776 P.2d 986 (1989) (citing *Hawkman v. Parratt*, 661 F.2d 1161, 1168 (8th Cir. 1981)).

In *Jones*, defense counsel failed to interview three eyewitnesses who were clearly identified in discovery provided by the State. *Jones*, 183 Wn.2d at 332, 337. The Supreme Court reversed for ineffective assistance. *Id.*, at 347; *see also Visitacion*, 55 Wn. App. at 174-175.

In this case, defense counsel's error was even more significant. At a minimum, a competent attorney should review the discovery provided by the State. By failing to familiarize himself with the discovery, defense counsel deprived Mr. Thiede of the effective assistance of counsel.

⁶ Ineffective assistance is an issue of constitutional magnitude that the court can consider for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5 (a)(3).

The materials counsel received from the prosecution included two recordings of phone calls. Ex. 7, Supp. CP. During trial, defense counsel was surprised when a witness referenced the phone recordings and claimed that the evidence “was not provided to us.” RP (1/16/19) 82. He went so far as to say “[p]otentially this could exonerate my client if it’s actually a recorded voice.” RP (1/16/19) 83. He told the court that he hadn’t heard the recordings, and again said “You know, I think potentially it’s going to exonerate my client.” RP (1/16/19) 95-96.

Defense counsel later acknowledged that the recordings had been provided as part of discovery.⁷ RP (1/16/19) 113. He apologized and told the judge that he “should have caught that.” RP (1/16/19) 113.

The two recordings were played for the jury. RP (1/17/19) 205-206, 216-217. The clips included threats and foul language. Ex. 7, Supp. CP. The speaker announced that he was “Carlos Michael Thiede.” Ex. 7, Supp. CP. Witnesses identified Mr. Thiede’s voice on the recordings. RP (1/17/19) 205-206, 216-217

The evidence eviscerated Mr. Thiede’s defense theory. Counsel had planned to argue that someone had used Mr. Thiede’s stolen phone to

⁷ He’d mistakenly believed the video was an image file—one which he had apparently not even tried to view. RP (1/16/19) 113.

send threatening messages. RP (7/16/18) 9-17. The recording refuted this theory. RP (1/17/19) 205-206, 216-217.

Having failed to review the discovery, defense counsel was in no position to prepare the case for trial. Indeed, counsel could not properly advise Mr. Thiede on whether to seek a plea bargain rather than contesting the charges at trial. *See A.N.J.*, 168 Wn.2d at 111-112, 225 P.3d 956 (2010).

To obtain relief on an ineffective assistance claim, a defendant must show “that (1) his counsel’s performance fell below an objective standard of reasonableness and, if so, (2) that counsel’s poor work prejudiced him.” *Id.*; *Kyllo*. 166 Wn.2d at 862.

Prejudice is established when there is a reasonable probability that counsel’s deficient performance affected the outcome of the proceeding. *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018). This “reasonable probability” standard is less than a preponderance; it requires only a probability sufficient to undermine confidence in the outcome. *Id.*

Counsel’s deficient performance calls into question the outcome of the proceeding. *Id.* Counsel should have undertaken the basic task of familiarizing himself with the discovery prior to trial. *Jones*, 183 Wn.2d 339-347; *Visitacion*, 55 Wn. App. at 174-175. This would have enabled

him to properly advise his client and to prepare to meet the evidence at trial.

Defense counsel deprived Mr. Thiede of the assistance to which he was constitutionally entitled. *A.N.J.*, 168 Wn.2d at 111-112. Mr. Thiede's convictions must be reversed. *Id.* The case must be remanded for a new trial. *Id.*

CONCLUSION

The State never introduced evidence proving S.R. subjectively feared that any threats to kill her would be carried out. Because of this, Mr. Thiede's conviction in Count Two is based on insufficient evidence. The conviction must be reversed, and the charge dismissed with prejudice.

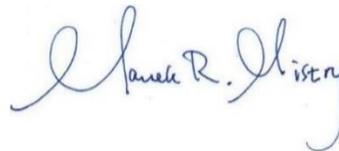
In addition, defense counsel failed to review the discovery prior to trial. As a result, he was unable to competently represent Mr. Thiede. The convictions must be reversed, and the case remanded for a new trial.

Respectfully submitted on August 5, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 5, 2019.



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