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Division III
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NO. 36821-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

D. R. C.,

Respondent/Appellant.

BRIEF OF RESPONDENT/APPELLANT

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ASSIGNMENTS OF ERROR

1. Finding of Fact 21 - “They contained threats to harm the victim” - is a conclusion of law based upon Finding of Fact 20. (CP 37)

2. Finding of Fact 32 - “In State’s Exhibit 1 and Defendant’s Exhibit 4, the recipient of the messages, ‘Joshua’ seemed to take the threats seriously and suggested she tone them down.” - is a mixed conclusion of law in finding of fact. (CP 38)

3. Conclusions of Law 4, 5, 6, 7 and 8 are not supported by the record. (CP 38; Appendix “A”)

4. The record contains insufficient evidence to support the trial court’s determination that D.R.C. was guilty of gross misdemeanor harassment.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Is the trial court’s determination that D.R.C.’s text messages to her friends were true threats supported by the record, or, alternatively, are they equivalent to the threats discussed in *State v. Kohonen*, 192 Wn. App. 567, 370 P.3d 16 (2016)?

2. Are the trial court’s Conclusions of Law 4, 5, 6, 7 and 8 supported by the findings of fact in the record?

3. Is Finding of Fact 21 a conclusion of law?

STATEMENT OF THE CASE

D.R.C. engaged in a verbal dispute with her mother on November 28, 2018. The dispute involved a red sweatshirt. A house rule was that D.R.C. was not to possess any red clothing. (RP 65, ll. 24-25; RP 66, l. 20 to RP 67, l. 4)

D.R.C. did not verbally threaten her mother during the argument. She did slam the door to her room after her mother left. Her mother then returned and took the door off its hinges. She also confiscated D.R.C.'s cellphone. (RP 67, l. 19 to RP 68, l. 1; RP 84, ll. 10-24)

A telephone call was made to 9-1-1. An officer arrived and spoke with both D.R.C. and her mother. D.R.C. was not arrested. After the officer left D.R.C.'s mother replaced the door on her room. (RP 68, l. 6; RP 68, l. 25 to RP 69, l. 16)

D.R.C. was texting on her cellphone during the argument. After seizing the cellphone her mother observed text messages which she considered threatening. (RP 69, l. 21 to RP 70, l. 11; RP 77, ll. 4-5; RP 78, ll. 1-5; Exhibits 1, 2, 3 and 4; Appendices "B", "C", "D" and "E")

Copies of the text messages were provided to law enforcement the next day. Exhibits 1, 2 and 4 pertain to November 28. Exhibit 3 is a prior text from October 2018. (RP 70, ll. 18-25; RP 74, ll. 9-22)

Exhibits 1 and 4 are to D.R.C.'s friend Joshua. The text messages include emojis which constitute part of the particular message being conveyed. (RP 75, ll. 1-7; RP 75, ll. 21-25; RP 76, ll. 1-15; RP 77, ll. 6-9; RP 89, ll. 2-9)

Concerned by the text messages D.R.C.'s mother slept with a knife under her pillow until she bought a taser on November 30. (RP 79, ll. 10-16; ll. 23-25)

D.R.C. and her mother discussed the text messages at a later date. After that discussion her mother indicated she was no longer fearful of her daughter. (RP 85, ll. 20-22; RP 86, ll. 8-17)

At no time during their relationship was there any physical abuse by D.R.C. toward her mother. (RP 86, ll. 20-23)

An Information was filed on January 28, 2019 charging D.R.C. with one (1) count of gross misdemeanor harassment. (CP 1)

During the adjudicatory hearing that followed D.R.C. testified that the text messages were only meant for her friends. (RP 98, ll. 7-11)

D.R.C. testified that she often vents with her friends and may say violent things; but she would never follow through on them. (RP 98, ll. 15-20)

The use of the emojis on the text messages was a means of showing that she was joking. She was not going to do anything to her mother. She had no plans to harm her mother on November 28, 2019. (RP 99, ll. 3-7; RP 99, l. 17 to RP 100, l. 2; RP 100, ll. 9-17)

D.R.C. further indicated that she and her friends are all talk and that she would not ask anyone to hurt her mother at any time. (RP 101, ll. 12-24; RP 102, ll. 9-12)

The State, during closing argument, indicated that D.R.C.'s friends were not a reasonable group since they used the same type of language in their text messages. (RP 104, l. 12 to RP 105, l. 7)

An Order of Adjudication and Disposition was entered on April 22, 2019. (CP 12)

Findings of Fact and Conclusions of Law were entered on May 22, 2019. (CP 35)
D.R.C. filed her Notice of Appeal on May 22, 2019. An Order of Indigency was previously entered on May 20, 2019. (CP 32; CP 40)

SUMMARY OF ARGUMENT

D.R.C.'s text messages are not true threats. When the true threat analysis is applied to the text messages it becomes apparent that D.R.C. did not knowingly threaten her mother. D.R.C. was merely venting her frustrations to her friends. Her venting would be no different than writing in a diary or muttering to herself.

The text messages are a means of communication, as well as a means to divert anger in a more acceptable way than a physical confrontation.

The evidence adduced at the adjudication hearing is insufficient to establish that the text messages were true threats. The Court's determination that D.R.C. was guilty of gross misdemeanor harassment should be reversed and dismissed.

ARGUMENT

RCW 9A.46.020(1) provides, in part:

A person is guilty of harassment if:

- (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person ...; and
 - (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. “Words or conduct” includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

Text messages are a means of electronic communication.

The text messages are indicative of an angry response by D.R.C. to her mother’s actions. They do not constitute either a direct or indirect threat to her mother. The emojis used and the nature of the exchange with her friends establishes that there was no intent by D.R.C. to harm her mother in any way. This is the way that teens express themselves on social media.

... [T]he harassment statute itself does require a mental element. **The statute requires that the defendant “knowingly threatens” ... this means that “the defendant must subjectively know that he or she is communicating a threat,** and must know that the communication he or she imparts directly or indirectly is a threat of intent to cause bodily injury to the person threatened or to another person.” *J.M.*, [*State v. J.M.*, 144 Wn.2d 472, 28 P.3d 720 (2001)] at 481. Thus, one who writes a threat in a personal diary or mutters a threat unaware that it might be heard does not knowingly threaten. *Id.*

State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). (Emphasis supplied.)

D.R.C. contends that the following summary from the State’s closing argument does not correctly analyze the

... threat. True threat is a statement made in the context or under such circumstances wherein a reasonable person, in the defendant’s place, would foresee that statement would be

interpreted by a listener as a serious expression of intention to inflict bodily harm on another.

And the reason I wanted to bring this up was because of the part where it says a reasonable person in the defendant's place. **When D. R. C. is talking about these text messages or making these -- making these threats in these text messages, she is talking to a group, which I don't think the Court could call a reasonable group that would interpret these as threats.**

She's talking to a group that is very used to this sort of language. When a person such as Jessica or anybody else maybe in Jessica's position would read these text messages, I think it's pretty clear that D. R. C. could foresee that these messages could be interpreted as true threats. So, that's the point I am going to make with that argument, Your Honor.

(RP 104, l. 12 to RP 105, l. 7) (Emphasis supplied.)

The Court, in its ruling, relied upon *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016). The *Trey M.* case involved a request to change the true threat analysis from an objective intent to a subjective intent. D.R.C. asserts that this was not her argument during the course of her hearing.

The *Trey M.* case referenced *State v. Kohonen, supra*. The *Kohonen* case was not addressed by the trial court.

State v. Kohonen referred to *State v. Locke*, 175 Wn. App. 779, 307 P.3d 771 (2013), which considered e-mails involving former Governor Gregoire. The e-mails were so worded that the *Locke* Court concluded that they were not true threats since there was no intent by Locke to kill the governor.

The *Kohonen* Court was considering tweets. It compared those tweets to the e-mails in *Locke* and concluded that they did not constitute true threats. *See: State v. Kohonen, supra*, 579.

The *Kohonen* Court went on to note at 580:

... **[I]n true threat cases, it is not just the words and phrasing of the alleged threat that matter, but also the larger context in which the words were uttered, including the identity of the speaker, the composition of the audience, the medium used to communicate the alleged threat, and the greater environment in which the alleged threat was made.** Herein, the combined high school and social media context in which the alleged threats were made further supports the conclusion that J.K.'s tweets did not constitute true threats.

The author of the alleged threats was J.K., an adolescent high school student. The intended audience was J.K.'s Twitter followers, approximately 100 of her friends and acquaintances, - in short, members of her peer group. The alleged threats were disseminated via Twitter, a popular social media platform. Testimony established that J.K. and her peers used Twitter to "tweet their feelings, things that are going on, funny pictures, just pictures in general" and to "post [their] facts, [their] reactions to things, [their] feelings, things that happen to [them] on a daily basis[, and] inside jokes with friends."

(Emphasis supplied.)

D.R.C. sees no significant difference between her text messages and J.K.'s tweets.

The trial court's Finding of Fact 21 is a conclusion of law. It concludes that the text messages constituted a threat to D.R.C.'s mother.

If a finding of fact is a conclusion of law, it is reviewed as a conclusion of law. Conclusions of law are reviewed *de novo*. See: *State v. Hutsell*, 120 Wn.2d 913, 918-19, 845 P.2d 1325 (1993); see also: *Blackburn v. D.S.H.S.*, 186 Wn.2d 250, 375 P.3d 1076 (2016).

A careful review of the text messages clearly reveals frustration on the part of D.R.C., but not intent to harm. There was no subjective knowledge that D.R.C.'s texts were a threat to harm.

CONCLUSION

When analyzing a challenge to the sufficiency of the evidence

“... [t]he critical inquiry is ... to determine whether the record evidence could reasonably support a *finding of guilt beyond a reasonable doubt*.” *Jackson v. Virginia* [443 U.S. 307, 61 L. Ed.2d 560, 99 S. Ct. 2781 (1979)] ... at 318. (Italics ours.) This inquiry does not require the reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*." *Jackson v. Virginia, supra* at 319. (Italics ours.)

State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The trial court's Conclusions of Law 4, 5, 6, 7 and 8 are all predicated upon the determination that the text messages were true threats. It is D.R.C.'s position that if the

Court determines that the text messages were not true threats, then the only possible result is a reversal of her conviction and dismissal of the charge.

DATED this 31st day of October, 2019.

Respectfully submitted,

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APPENDIX “A”

32. In State's Exhibit 1 and Defendant's Exhibit 4, the recipient of the messages, "Joshua" seemed to take the threats seriously and suggested she tone them down.

33. Findings of fact made on the record during the Court's oral ruling are incorporated by reference herein.

CONCLUSIONS OF LAW

1. WPIC 36.06 defines gross misdemeanor harassment.
2. The First Amendment does not protect true threats.
3. The definition of a true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another individual.
4. The State's evidence meets the definition of a true threat.
5. The victim's actions upon learning of the text messages supports the element of reasonable fear.
6. The State proved beyond a reasonable doubt that the respondent knowingly and without lawful authority threatened to cause bodily injury immediately or in the near future to the victim.
7. The State also proved beyond a reasonable doubt that the words and conduct used by the respondent placed the victim in reasonable fear that the threat would be carried out.
8. Conclusions of law made on the record during the Court's oral ruling are incorporated by reference herein.

Therefore, the respondent is guilty of harassment under RCW 9A.46.020(1) and (2)(a).

APPENDIX “B”

Joshua

Okay aha

JOSHUA

How was school

ME

My mom took my fucking shit and she
fucking took my door off
She's a dumb fucking cunt

JOSHUA

Hahahah no door !'

Damn guess u can't masterbate

ME

Imma fucking do whatever tf I want she's
fucking stupid

JOSHUA

Haha beat her ass

ME

Bet imma get her killed if anything

JOSHUA

Woh chill just beat her ass that's it lol

ME

Nah

I hope she dies

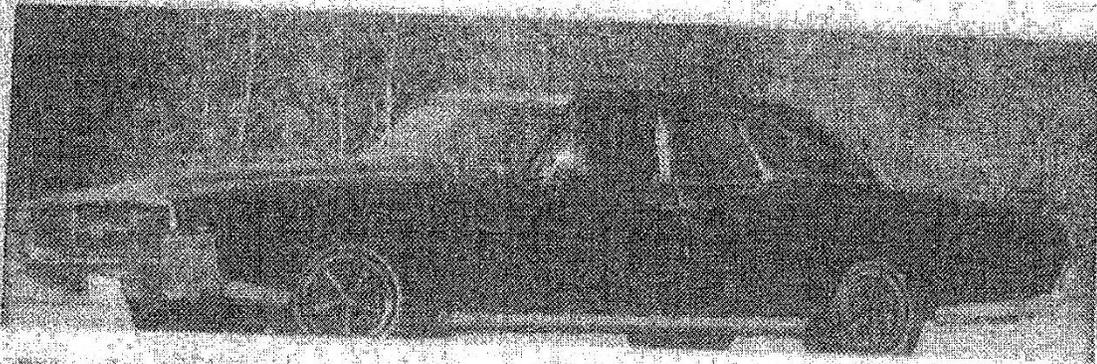
19.8. 48-39 4/23/19

State Of Washington VS Criman

State Ident. | Defts. Ident. _____

State Exhibit | Defts. Exhibit _____

APPENDIX “C”



Bitch yesssssss

That's why I'm going off the pill imma trap his ass

LEXY

DAMNNNNN

LEXY



Damn she's being hella harsh on u

imma fucking kill this bitch

She is u you make me go to my dads

17.0.18.20
State of Washington vs
State Ident. 2
State Exhibit 2

APPENDIX “D”

YES YES YES

Bitch ur always cute ♡

Bitch no if u losing best believe I'm jumping in I won't let u take an L tf?! And same bitch I'll shank a hoe with my pencil or bald point pen let a bitch get ink poisoning and bleed out n die stupid hoe really trying me

LEXY ♡

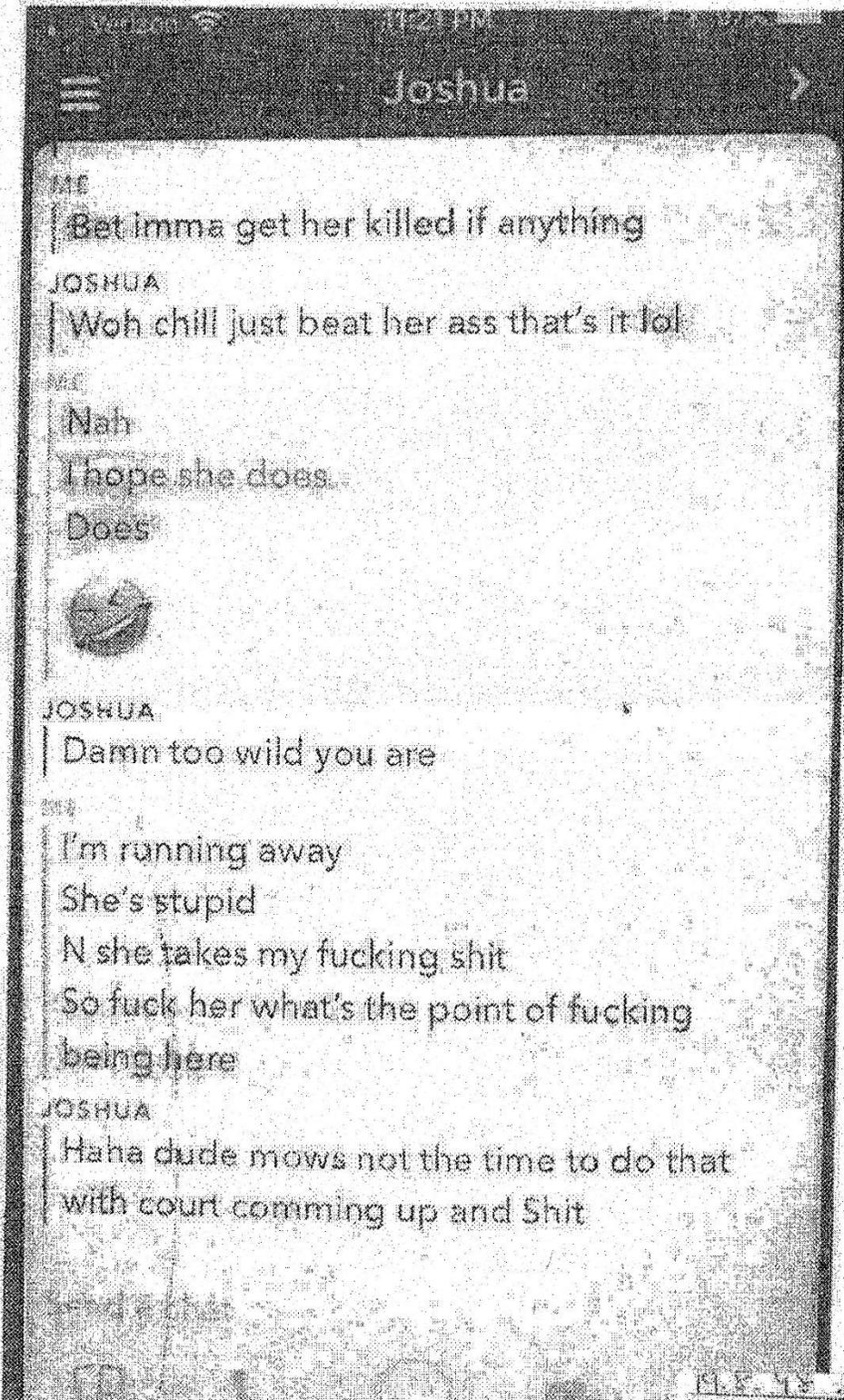
Damn bitch i cant with you ♡ u really scare me sometimes !!

Lmfao I scare hella people ion care tho wtf ♡ a bitch wanna think she about it Imma take her life ♡ don't fw my girls ♡ family over everything so if a bitch fw u Imk and imma fucking take her life or slam her face in the wall if she's lucky

I love u too bitch ♡ ♡ ♡

19.8.18 34 11/04/19
State Of Washington VS Cyrimin
State Ident 105 Date Ident. _____
State Exhibit 3 Date Exhibit _____

APPENDIX “E”



M.E. 18 37 400 R
 State Of Washington VS Crinson
 State Ident. _____ Defs. Ident. 4
 State Exhibit _____ Defs. Exhibit 4

NO. 36821-1-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	YAKIMA COUNTY
Plaintiff,)	NO. 19 8 00048 2
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
D. R. C.,)	
)	
Respondent,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 31st day of October, 2019, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

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