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Court of Appeals
Division III
State of Washington
10/21/2019 3:36 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36846-7-III

STATE OF WASHINGTON, Respondent,

v.

ILARIO MANJARES, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

A jury convicted Ilario Manjares of crimes including two counts of felony harassment arising from a threat to return to the home of two strangers and shoot them up. Because the threat could not have placed the individuals in reasonable fear that Manjares would kill them, the evidence is insufficient to support the convictions for felony harassment and the case should be remanded to enter judgment and resentence Manjares for the crime of misdemeanor harassment.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The evidence is insufficient to support the convictions for felony harassment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether threatening to shoot up an apartment building objectively creates a reasonable fear of death if the threat is carried out.

IV. STATEMENT OF THE CASE

On a night at the end of November 2018 in Sunnyside, police received reports of an attempted assault with a vehicle description involving a white SUV. I RP 253, 255, 256-57. A patrol officer who was near the location drove toward the area and saw a white SUV traveling at

high speed across Yakima Valley Highway. I RP 257-58. Suspecting it was the person associated with the calls, the officer followed the car and turned on its lights and sirens. I RP 258. The car did not stop and turned into an industrial area, continuing past the end of the paved road and continuing onto a set of train tracks. I RP 260-61. The officer pursued the car down the train tracks until the car began to turn and rolled into a canal. I RP 261-62. The driver, who was the lone occupant of the vehicle, emerged and was taken into custody. I RP 264, 266, 267. He was identified as Ilario Manjares and police recovered a small folding knife from the pocket of a hoodie he was wearing. I RP 102, 110, 111-12.

Police later spoke to several witnesses and obtained statements. I RP 246, 248. Ultimately, the State charged Manjares with two counts of second degree assault with deadly weapon enhancements, two counts of felony harassment, and attempting to elude a pursuing police vehicle arising from the complaints and the ensuing pursuit. CP 14-15. The case proceeded to a jury trial. I RP 88.

At trial, the State presented testimony concerning two altercations that occurred before the police pursuit. Julio Ramirez and his girlfriend Daisy Perez testified that they had been eating dinner in the Jack in the Box parking lot around 10 p.m. when they started to drive home and

noticed a white SUV following them. I RP 117, 119-20, 163-64. Ramirez lived in a large apartment complex about five minutes away. I RP 121. When they pulled into the complex, the white SUV pulled in behind them and parked, and someone wearing a hood got out and began walking toward them. I RP 122, 165. Ramirez asked what was wrong and the man said something like “You have Hailey” or “where’s Hailey at.” Ramirez said no and told the man he thought he was confusing them with someone else. I RP 123, 168. The man then took a knife out of the pocket of his hoodie and swung it toward Ramirez, coming closer as he did so but no closer than about an arm’s length away. I RP 123, 125, 126, 133, 168, 170.

Ramirez told Perez, who was driving, to leave as soon as she could, and she put the car in reverse and drove away. I RP 120, 127, 171. The man continued to swing the knife in their direction as the car was driving away. I RP 127, 142, 171. Ramirez spoke with police the same night and identified Manjares at trial as the man who approached them. I RP 118, 127, 173.

Concerning the second altercation, Alexandra Morfin was going out with friends at a bar the same night and parked out back. I RP 194, 197. Feeling somebody looking at her window, she turned around and

saw a man standing close to her car, almost touching the window, asking for Hailey. I RP 197-98. Morfin told the man she did not know a Hailey and drove away to park in the front where there were other cars. I RP 198-99. As she drove around the block, she saw that a white SUV was following her. I RP 199.

Morfin, frightened, called her friend Hector Gallardo crying and said somebody was following her. I RP 99, 223, 225. The SUV tailgated her and at one point tried to sideswipe her car. I RP 200. She drove to the home of her friend Hector Gallardo, who lived about a mile away and was standing outside when she arrived. I RP 200-01. The man jumped out of his car as Morfin parked and confronted them about Hailey, accusing Gallardo of having sex with her. I RP 202-03, 225-27. Morfin told the man she did not know a Hailey and got out of her car to call 911. I RP 203, 229. The man was holding a knife in his hand. I RP 203-04, 219, 226.

The man saw her call 911 and said that he would come back and shoot them up or shoot up the house. I RP 205, 228. Then he got in the car and left. I RP 205. Morfin was still so scared that she did not want to leave to give police a statement because she was afraid he would come back. I RP 206. Gallardo believed the man might really do what he said

because of how he was acting. I RP 228. He identified Manjares at trial as the man who threatened them. I RP 224.

Manjares testified at trial on his own behalf, identifying “Hailey” as his ex-wife. I RP 317-18. According to Manjares, he was looking for Hailey that night because she was not following court orders concerning visitation with their two children. I RP 318, 320. He received a tip that she was at a bar. I RP 319. He asked the bouncers if she was there and they became confrontational with him and threatened to shoot him, so he took out the knife to defend himself. I RP 319-20, 321.

Manjares got into his car to escape the altercation and drove around to the back where he saw a car he believed belonged to one of Hailey’s friends. I RP 321. Assuming the driver was Hailey’s friend, he questioned her, but because she looked offended and he was suspicious she was not being forthcoming with him, he followed her. I RP 322-23. Admitting he was irritated, he got out of the car at the house and continued to ask where Hailey was at. I RP 324-25. The guy looked familiar to him, like somebody Hailey worked with. I RP 326. Eventually, Manjares decided Hailey was not there and they were not going to tell him if they knew where she was, so he drove away. I RP 326-27. He did not recall Morfin calling 911. I RP 327. He also acknowledged he was still carrying

the knife due to the incident at the bar but he did not know if it was open or closed. I RP 329.

After he left, he drove to the gas station where he thought he saw the same people that had confronted him at the club, so he followed them and confronted them. I RP 331-32. He thought that they looked like “gang bangers”¹ because they had blue rags hanging out of their pockets. I RP 334. He was still pretty irritated when he asked where Hailey was but he denied swinging the knife, saying he remembered only holding it downward for defense. I RP 334. The people were irritated and defensive, which made him suspicious, but after they drove away he decided it was pointless so he went in a different direction. I RP 336-37.

After driving away, he decided to pull into a warehouse to calm down and think. I RP 339. He decided to drive down the train tracks because he saw a storage area behind the warehouse where he could park and relax. I RP 339, 341. He began to turn off onto a small road but because it was wet, the vehicle slid forward into the canal. I RP 339. Manjares acknowledged he might have seen the police officer when he was further down the tracks, but denied seeing him at first. I RP 340.

¹ Manjares volunteered details about his own gang associations on cross-examination to explain why he believed these individuals had “beef” with him. I RP 346, 358-59.

The jury acquitted Manjares of assaulting Perez but convicted him of the remaining charges, including two counts of felony harassment against Morfin and Gallardo. CP 55-66, 81. The sentencing court imposed a mid-range sentence of 50 months in prison, followed by 18 months of community custody. CP 115. Manjares now appeals and has been found indigent for that purpose. CP 122, 126.

V. ARGUMENT

A person is guilty of felony harassment only if he threatens to kill another and the other is reasonably placed in fear that he will carry out the threat to kill. RCW 9A.46.020(1), (2)(b)(ii); *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003) (holding threat made and threat feared must be the same). At issue in this case is whether Manjares's threat to return to the house and shoot up Morfin and Gallardo satisfies the essential elements of the offense. Because it is legally insufficient that Morfin and Gallardo reasonably believe they could be physically injured, the evidence is insufficient to support the felony conviction, only the misdemeanor.

The Due Process clause prohibits a conviction without proof of all essential elements of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). If the State fails to present sufficient

evidence to support a conviction at trial, double jeopardy prohibits retrial. *Burks v. U.S.*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978).

In a challenge to the sufficiency of the evidence, the reviewing court considers all of the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 198, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence and the reviewing court defers to the trier of fact on questions of credibility, resolving conflicting evidence, and persuasiveness. *State v. A.T.P.-R.*, 132 Wn. App. 181, 184-85, 130 P.3d 877 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter. *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n*, 151 Wn. App. 788, 807, 214 P.3d 938 (2009), *affirmed*, 173 Wn.2d 608 (2012).

The Washington Supreme Court has held that a conviction for felony harassment “requires proof of reasonable fear that the threat to kill will be carried out.” *C.G.*, 150 Wn.2d at 607. This is because the primary purpose of criminalizing threats is to protect victims from fear, and a person who fears being killed is harmed more than one who fears bodily injury.” *Id.* In *C.G.*, a student threatened to kill the vice principal of her

school but the victim testified only that he feared harm. *Id.* at 606-07. In holding the State did not prove the felony, the case establishes that the primary distinction between felony and misdemeanor harassment is whether the State proves the victim's reasonable fear was death or bodily injury, even if the threat made by the defendant is a threat to kill. *Id.* at 611.

The harassment statute also specifically requires that the fear be objectively reasonable as well as subjectively experienced. *State v. Alvarez*, 74 Wn. App. 250, 260-61, 872 P.2d 1173 (1994), *affirmed*, 128 Wn.2d 1, 904 P.2d 754 (1995). Thus, when a trial court found that the victim had been fearful but made no express finding concerning the reasonableness of the fear, it committed error warranting vacation of the conviction; but the remedy was to remand for entry of findings. *Id.* at 261-62.

Reading *C.G.* and *Alvarez* harmoniously, a felony harassment charge requires the State to prove that the defendant made a threat to kill, that the victim fears death, and the victim's fear is objectively reasonable. Here, according to the trial testimony, Manjares threatened to return to the home where he confronted Morfin and Gallardo and "shoot them up" or "shoot up [Gallardo's] house." I RP 205, 228. For purposes of this

appeal, Manjares does not take issue the State's position that Manjares's words can be understood as threat to kill even though he did not use the specific words "kill or die." *See* CP 51. What is at issue is whether Morfin or Gallardo could reasonably be placed in fear of death, or merely bodily injury, if Manjares carried out the threat, as needed to sustain a felony conviction. Because death is not a reasonably likely outcome from carrying out the threat, this burden is not met.

The record indicates Morfin and Gallardo believed Manjares was a gang member and were afraid he would come back to commit a drive by shooting against them or their house. I RP 59-61, 205, 228. It is understandable that this belief would cause fear. But it is not reasonable to fear that they would be killed because it is not reasonably likely that they would die, even if they were shot. Philip J. Cook, Ariadne E. Rivera-Aguirre, Magdalena Cerdá, & Garen Wintemute, *Constant Lethality of Gunshot Injuries From Firearm Assault: United States, 2003–2012*, *American Journal of Public Health* 107, no. 8 (August 1, 2017): pp. 1324-1328² (establishing gunshot lethality rate of 22% for all causes). It is true that they could be hurt, even severely, but fear of bodily injury is insufficient to prove a felony charge – it only supports the misdemeanor.

² Available online at <https://doi.org/10.2105/AJPH.2017.303837>.

Because it is not reasonably likely that Morfin and Gallardo would die if Manjares carried out the threat, any subjective fear of death is not reasonable. It is normal for individuals to experience subjective fear of statistically unlikely events, such as plane crashes or terrorist attacks. But the experience of fear is not the State's only burden, the State must prove that the fear is reasonable. Here, the evidence fails to show that Manjares's threat could reasonably place Morfin and Gallardo in fear of death, rather than fear of bodily injury, when they would be unlikely to die as a consequence of carrying out the threat.

VI. CONCLUSION

For the foregoing reasons, Manjares respectfully requests that the court REVERSE the convictions for felony harassment and REMAND the case for entry of judgment and resentencing pursuant to convictions for misdemeanor harassment.

RESPECTFULLY SUBMITTED this 21 day of October, 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 21 day of October, 2019 in Kennewick, Washington.



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October 21, 2019 - 3:36 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36846-7
Appellate Court Case Title: State of Washington v. Ilario Manjares
Superior Court Case Number: 18-1-02277-6

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