

NO. 45484-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JONAH JOHNSON,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State and Federal due process rights of appellant Jonah Johnson were violated when he was convicted for Felony Harassment, committed against Heather Luurs, in the absence of sufficient evidence to prove all the essential elements of that crime.

2. The State failed to prove beyond a reasonable doubt that Mr. Johnson uttered a "true threat" when he left a message saying he would "blast" Ms. Luur's face off.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. To prove Felony Harassment, the prosecution was required to present evidence sufficient to show, beyond a reasonable doubt, that Mr. Johnson made a knowing threat to kill Ms. Luurs, that she believed that he would make good on that threat, and that the belief was reasonable. Is reversal required for failing to prove every element of Felony Harassment where the prosecution failed to prove that Mr. Johnson made a "true threat" to kill, where Ms. Luurs stated that she was not afraid during the incident and the circumstances were such that any fear that he would kill her was not reasonable? Assignments of Error 1 and 2.

C. STATEMENT OF THE CASE

Heather Luurs has been in a relationship with Jonah Johnson for three years. Report of Proceedings (RP) at 33, 100.¹ Mr. Johnson, who had his own residence, was at her apartment in Chehalis, Lewis County, Washington on the afternoon of August 17, 2013, when an argument occurred between the couple. RP at 33, 101. Ms. Luurs told him that he had to leave, so he left the apartment and returned to his house, which was located nearby. RP at 34, 102. Ms. Luurs said that she did not want him to scream or yell at her so she locked the door after he left and then spent the afternoon cleaning the apartment. RP at 34, 35.

Later that day Mr. Johnson called Ms. Luurs and left a message that he would “blast” her “face off” when he saw her. RP at 35. Exhibit 1. Mr. Johnson returned to her apartments later in the afternoon because he was “sad” that she would not answer his calls. RP at 103.

Mr. Johnson denied that he threatened to kill Ms. Luurs, stating that the message that he was going to “blast” her face meant that he was going to yell at her when he next saw her. RP at 105.

¹The record of proceedings consists of the following:
RP --- August 22, 2013 (arraignment), August 29, 2013 (motion hearing), September 12, 2013, (omnibus hearing), October 10, October 12, 2013, (jury trial), and October 16, 2013, (sentencing).

Jerry Linthicum, a friend of Mr. Johnson's, arrived at the apartment to take Ms. Luurs' children fishing. RP at 72. He saw that Mr. Johnson was sitting on the front porch of Ms. Luurs' apartment, crying. RP at 72, 104. Mr. Johnson told him that he loved Ms. Luurs and that he just wanted to talk to her. RP at 72.

An upstairs neighbor, Teresa Steffens, testified that she heard Mr. Johnson pounding on Ms. Luurs' door and yelling "I'm going to kill you, you fucking bitch." RP at 53, 58. She called the police, who placed Mr. Johnson under arrest. RP at 73. Ms. Steffens stated that when she saw Ms. Luurs after the arrest, she seemed scared and frightened. RP at 55.

Mr. Linthicum, on the other hand, stated that he did not hear Mr. Johnson make any threats against Ms. Luurs and he did not even know that she was in the apartment until after Mr. Johnson was arrested. RP at 75. He stated that when he saw Ms. Luurs after Mr. Johnson was arrested, she did not appear hurt or scared. RP at 78.

Ms. Luurs said that she was not aware that Mr. Johnson had returned to her apartment building until she saw police outside. RP at 44. She stated that she was not afraid of Mr. Johnson and that the couple had argued on other occasions during their relationship. RP at 48. She said that she did

not call the police because she was not afraid of him and did not feel threatened by the argument. RP at 34, 37, 44, 49. She stated: "I wasn't afraid. I never felt threatened at all." RP at 49. She noted that in the parlance of their relationship, his statement that he was going to blast her face off was that he would "scream and yell" at her and that he "uses that tense quite a bit." RP at 44-45.

The Lewis County Prosecutor's Office charged Mr. Johnson by information with domestic violence felony harassment contrary to RCW 9A.46.020(1)(a)(i) and 9A.46.020(2)(b)(ii). Clerk's Papers (CP) 1-3. The matter was tried to a jury on October 10 and 11, 2013, before the Honorable Judge Nelson Hunt. RP at 10-164. Mr. Johnson was convicted of felony harassment as charged. RP at 160. The jury also found by Special Verdict that Mr. Johnson and Ms. Luurs were family or household members at the time of the offense. CP 36, 37.

At sentencing the parties agreed that the standard range was 4 to 12 months. Mr. Johnson was ordered to serve a sentence of 8 months in custody RP at 165, 169; CP 41, 42.

Timely notice of appeal was filed October 16, 2013. CP 52. This appeal follows.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE FELONY HARASSMENT

A criminal defendant's constitutional right to due process requires the State to prove every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

An accused person's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. VI; Const. art. I, § 22. When the sufficiency of the evidence is challenged on appeal, the Court examines all of the evidence and decides whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The evidence must be viewed in the light most favorable to the State, with all reasonable inferences construed against the accused. *Id.* Evidence is sufficient to support a conviction only if, "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*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *State v. Drum*, 168 Wn.2d 23,

34-35, 225 P.3d 237 (2010).

The prosecution failed to prove Mr. Johnson expressly threatened Ms. Luurs or that he did so with the intent that she perceived his actions as a true threat to kill her.

In order to prove that he committed felony harassment against Ms. Luurs, the prosecution was required to prove Mr. Johnson intended his words and conduct to be interpreted as if he seriously intended to kill her, and that his alleged threat was reasonably interpreted as "a serious expression of intention to inflict bodily harm upon or to take the life" of another. *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2005). See RCW 9A.46.020(1). The "threat" that underlies a felony harassment conviction must be the threat to kill. See *State v. J.M.*, 144 Wn.2d 472, 481-82, 28 P.3d 720 (2001). Ms. Luurs did not testify that she heard Mr. Johnson make any threats outside her door, and in fact she was unaware that he had returned to her apartment complex after he left following their argument until the police arrived. RP at 40, 43, 44, 49. She testified that the only words she heard was his phone message that he would "blast" her face off, which she interpreted as meaning that he would "yell and scream" at her. RP at 44. She said that she locked the door after he left the apartment, not because she was afraid, but because

there was a chance she would be evicted from the apartment building if they had a loud argument. RP at 35, 39, 48.

In addition, there was insufficient evidence of a "true threat." Because the First Amendment protects speech, only "true threats" are proscribed by law. *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010); *see Kilburn*, 151 Wn.2d at 49. Because of the First Amendment implications of criminalizing speech, "[a]n appellate court must be exceedingly cautious when assessing whether a statement falls within the ambit of a true threat." *Kilburn*, 151 Wn.2d at 49. Here, there was insufficient evidence that a threat to kill was actually made. Ms. Luurs stated she did not hear the threat to kill described by Ms. Steffens. It was Ms. Steffens, not Ms. Luurs, who said Mr. Johnson had threatened, "I'm going to kill you, you fucking bitch." RP at 53. There is no testimony that she heard the threat described by Ms. Steffens. Ms. Luurs testified that she was unaware that he had even returned to her apartment building later in the afternoon until she looked outside and saw that police officers were there. RP at 44.

Moreover, there was insufficient evidence to prove that Ms. Luurs was actually afraid that Mr. Johnson would carry out a threat to kill. Ms. Luurs testified that they were having an argument and that she

was not afraid of him and that she “never felt threatened at all” by him. RP at 34, 37, 44, 49. As noted *supra*, Ms. Luurs testified that Mr. Johnson’s statement that he would “blast” her face off, merely meant to her that meant he would “scream and yell” at her. RP at 35, 44.

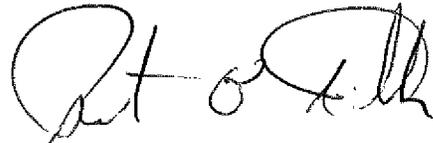
Because there was insufficient evidence to prove all the essential elements of felony harassment, reversal is required. Where evidence is insufficient to support a conviction, double jeopardy bars retrial for that offense, and the matter must be dismissed. *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

Based on the above, Mr. Johnson respectfully requests this Court to reverse and dismiss his conviction.

DATED: May 9, 2014.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on May 9, 2014, 2014, that this Appellant's Opening Brief was sent by JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402., and to Sara Beigh, Lewis County Prosecutor's Office, Sara.beigh@lewiscountywa.gov, and a true and correct copy was mailed by first class mail, postage prepaid to Jonah Johnson, c/o Lewis County Jail, 28 SW Chehalis Avenue, Chehalis, Washington, 98532, the following:

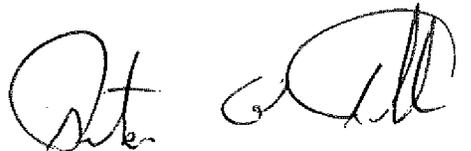
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 9, 2014.



PETER B. TILLER

TILLER LAW OFFICE

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