

Supreme Court No. 92943-2
COA No. 47362-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KENNY G. MADARASH,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Kenny Madarash, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Madarash seeks review of Division Two's Unpublished Opinion affirming his conviction for felony harassment of a criminal justice participant. *State v. Madarash*, Cause No. 47362-3-II (slip op. filed February 17, 2016). A copy of the Unpublished Opinion is attached hereto and incorporated by reference.

C. ISSUE PRESENTED FOR REVIEW

1. A defendant may not be convicted of a crime unless the State proves every element of the crime beyond a reasonable doubt. To convict a defendant of harassment of a criminal justice participant, the State must prove beyond a reasonable doubt that, inter alia, the defendant uttered a threat to cause bodily injury, and the criminal justice participant threatened reasonably feared that the threat would be carried out. Should this Court grant review and hold that the State has failed to sustain its burden of proving guilt beyond a reasonable doubt that the officer threatened reasonably

feared Madarash would act upon his alleged threat? RAP
13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Kenny Madarash was on supervision by the Department of Corrections (DOC) in Clark County, Washington. 1Report of Proceedings (RP) at 71. As a requirement of his DOC supervision, Mr. Madarash was prohibited from leaving Clark County without a written "travel permit." 1RP at 30-31, 74.

On April 4, 2014, James Kelly II of the Longview Police Department saw Mr. Madarash while on patrol in Longview, Cowlitz County, Washington. 1RP at 73. He saw Mr. Madarash while crossing Alabana Street in Longview outside the designated crosswalk while talking on his cellphone. 1RP at 73, 83. Officer Kelly recognized Mr. Madarash from previous contact with him approximately a week earlier and noted that Mr. Madarash appeared to be wearing the same clothing he was wearing during their contact in March, 2014. 1RP at 74, 84. Officer Kelly believed that Mr. Madarash was under DOC supervision and that he was not permitted to be in Cowlitz County without written DOC permission. 1RP at 74.

Officer Kelly stopped Mr. Madarash, directed him to stand in front of his patrol car, and asked him for identification. 1RP at 75. Mr. Madarash initially complied, and then swore at the officer and began to walk away from the patrol car down the middle of the street. 1RP at 75, 76. Officer Kelly grabbed his left arm and told him that he was under arrest. 1RP at 76. Mr. Madarash pulled his arm away from the officer and continued to walk away. 1RP at 74, 75, 76, 84. Officer Kelly testified that Mr. Madarash said that he did not have reason to stop him and that he was leaving. 1RP at 75. Officer Kelly attempted to grab Mr. Madarash's arm a second time and Mr. Madarash again pulled his arm away. 1RP at 76, 77. The officer pushed him against a parked car and told him that he needed to put his arms behind his back. 1RP at 77. Mr. Madarash continued to try to pull away and sworn at the officer and said that he was "not going to jail." 1RP at 77. While struggling with him, Officer Kelly called for additional units on his radio. 1RP at 77. Officer Kelly pushed him against a parked car and then forced Mr. Madarash to the ground. 1RP at 77, 78. While on the ground, Mr. Madarash continued to resist attempts to place him in handcuffs. 1RP at 79. During the struggle, while still on the ground and before additional officers arrived, Mr. Madarash told Officer Kelly

that he was a "f----- pig" and that he would "kick you're a----." 1RP at 79. After struggling with him on the ground, Officer Kelly was able to put him in handcuffs. 1RP at 79.

Officer Kelly testified that he did not know what Mr. Madarash had in his pockets during the struggle, that he was concerned that Mr. Madarash could have obtained a weapon, and that he was afraid that Mr. Madarash would follow through on his threat. 1RP at 79.

After Mr. Madarash was handcuffed, seven or eight patrol cars arrived at the scene, including Officer Tori Shelton and Officer Chris Angel. 1RP at 81. Mr. Madarash was searched and Officers Shelton and Angel then using an "escort hold," walked him to Officer Kelly's patrol car. 1RP at 81, 101. Officers Shelton and Angel testified that Mr. Madarash resisted being taken to the car, said that he was not going to go to jail, and that while struggling with the officers he angrily said "I'm gonna f----- kill you." 1RP at 81, 101, 119. The officers testified they were afraid that he would carry out his threat to kill them. 1RP at 101, 119.

After he was put in the back of the car, Mr. Madarash was transported to the Longview city jail. 1RP at 82. No weapons were found on his person when he was searched. 1RP at 93.

The Cowlitz County Prosecuting Attorney charged Mr. Madarash by amended information with felony harassment—threat to kill in Count 1, (pertaining to Tori Shelton), felony harassment—threat to kill in Count 2, (pertaining to Chris Angel), and harassment of a criminal justice participant in Count 3 (pertaining to James Kelly). RCW 9A.46.020(1), (2)(b)(iii). Clerk's Papers (CP) 13-15.

The jury found Mr. Madarash guilty of the lesser included charge of misdemeanor harassment in Counts 1 and 2, and guilty of threatening a criminal justice participant as charged in Count 3. 2RP at 115; CP 84, 86, 87. The court imposed a standard range sentence of 34 months. RP (8/5/14) at 57; CP 142.

1. Proceedings on Appeal.

On appeal, Madarash challenged his convictions, arguing that sufficient evidence did not support the convictions. The Court of Appeals rejected the argument challenging the convictions. For the reasons set forth below, Madarash seeks review.

E. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MADARASH MADE A "TRUE THREAT" TO CAUSE BODILY INJURY TO THE OFFICERS AND FAILED TO PROVE THAT THE OFFICERS REASONABLY BELIEVED MADARASH WOULD CARRY OUT HIS THREATS.

Kenny Madarash was convicted in Count 3 of felony harassment of a criminal justice participant resulting from a comment Mr. Madarash made to Officer Kelly that he would "kick your a__" while the officer was in the process of placing him under arrest. 1RP at 79. At the time of the statement, Madarash had been pushed against a parked car and then forced to the ground by the officer, who was in the process of handcuffing him. 1RP at 79. Mr. Madarash was convicted in Counts 1 and 2 of misdemeanor harassment resulting from the threat that he would kill the officers escorting him to the patrol car after he was placed under arrest and handcuffed.

In each of the three counts, the State did not prove beyond a reasonable doubt (1) that a reasonable person in the officers' position would understand his comments would be perceived as a threat to harm the officer, (2) that a reasonable police officer would interpret the statements as a genuine threat, or (3) that it appeared to the officers that Mr. Madarash had the present and future ability to carry out any threats. His convictions must therefore be reversed and dismissed.

Due process requires the State to prove beyond a

reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). 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. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). 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. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

RCW 9A.46.020(1), (2)(b) provides in relevant 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 another person; or . . .

(iv) To maliciously do any act that was intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words and conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020(1).

The crime is elevated to a felony if the defendant harasses a criminal justice participant. RCW 9A.46.020(2)(b)(iii), (iv). The statute provides:

A person who harasses another is guilty of a class C felony if any of the following apply: . . . (iii) the person harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties.

Under RCW 9A.46.020(2)(b), the State is also required to prove:

the fear from the threat must be a reasonable fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.

Threatening words do not constitute a threat unless it is apparent to the criminal justice participant that the defendant has the "present and future ability to carry out the threat." RCW 9A.46.020(2)(b).

Here, Madarash's comments to Officer Kelly were not "true threats" because a reasonable person in his position would not believe that the comments would place the police officer in fear that he would be injured, and (2) the officer was in the process of handcuffing Mr. Madarash, who was on the ground with the officer on top of him and did not have the present ability to carry out the purported threat to the officer and the conviction must be reversed.

Mr. Madarash's convictions for misdemeanor harassment must also be reversed for insufficiency of the evidence. Pursuant to RCW 9A.46.020(1) a person is guilty of harassment when:

(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; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; 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.

See RCW 9A.46.020(1)(a)(i), (b).

There were no other physical threats communicated to Officers Angel and Shelton other than the alleged threat to kill, an allegation which the jury rejected. 1RP at 100-102, 118-120. The harassment statute requires proof of a communicated threat. The evidence presented at trial did not support a conviction for harassment by threats to injure under RCW 9A.46.020(1)(a)(i). Nor was there any evidence of any threat to harm the officers' physical health or safety, other than the threat to kill, which the jury did not accept. See RCW9A.46.020(1)(a)((iv).

The State did not prove the elements of misdemeanor harassment or felony harassment of a criminal justice participant beyond a reasonable doubt. Unfortunately, police officers are expected as part of their duties to deal with people who are intoxicated, acting irrationally, angry, agitated, or in states of mental or physical distress. They are trained to deal with the public in a professional manner, but are unfortunately often subjected to varying degrees of verbal abuse when making an arrest or in the process of securing arrested persons. Mr. Madarash was under distress when contacted by Officer Kelly and when he was escorted

to the car by Officers Angel and Shelton. He was either in the process of being arrested or already placed in handcuffs and when he made the comments to the officers. 1RP at 93. He was subsequently determined to be unarmed when searched incident to arrest. He apologized for his comments when being transported to jail. RP at 88.

The State did not prove that a reasonable criminal justice participant in Officer Kelly's position would have been afraid that Mr. Madarash would carry out the purported threat to "kick his a--," nor did the State prove that Officers Angel and Shelton were placed in reasonable fear that Mr. Madarash would cause bodily injury to them immediately or in the future. The State also failed to prove that it was apparent to the officers that Madarash, who remained in custody after the arrest, had the present and future ability to carry out the threats as required by RCW 9A.46.020(2)(b).

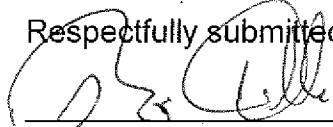
This Court should accept review and hold that the error was not harmless, and that the error requires reversal.

F. CONCLUSION

For the foregoing reasons, Kenny Madarash respectfully requests this petition for review be granted.

DATED this 17 day of March, 2016.

Respectfully submitted:



PETER B. TILLER, WSBA #20835
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on March 17, 2016, that this Petition for Review was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid Mr. Eric Bentson, Cowlitz County Prosecutor's Office, 312 SW 1st Ave., Rm 105, Hall of Justice, Kelso, WA 98625 and was mailed by U.S. mail, postage prepaid, to the appellant, Mr. Kenny Madarash DOC# 887250, Airway Heights, PO Box 1899, Airway Heights, WA 99001-1899 , LEGAL MAIL/SPECIAL MAIL.

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 March 17, 2016.



PETER B. TILLER

February 17, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KENNETH GEORGE MADARASH,

Appellant.

No. 47362-3-II

UNPUBLISHED OPINION

MAXA, J. – Kenneth Madarash appeals his convictions of felony harassment of a criminal justice participant and two counts of gross misdemeanor harassment. We hold that sufficient evidence supported these convictions, and therefore we affirm Madarash’s convictions.

FACTS

On March 28, 2014, Longview police officer James Kelly had contact with Madarash and learned from the Department of Corrections (DOC) that Madarash was under supervision in Clark County and not allowed in Cowlitz County without a trip permit. At that time, DOC officers took Madarash into custody.

On April 4, Kelly was on patrol when he saw a man he recognized as Madarash cross the street without using the crosswalk. Kelly pulled over and asked Madarash to stand in front of his car. When Kelly asked Madarash for identification, Madarash responded, “F*** you, I did nothing wrong.” Report of Proceedings (RP) (June 11, 2014) at 75. When Kelly asked Madarash if he had an outstanding arrest warrant, Madarash began walking away down the middle of the street.

Kelly then grabbed Madarash's arm and told him that he was under arrest. When Madarash pulled his arm away and said he was leaving, Kelly grabbed him again. Madarash again pulled away, so Kelly pushed him up against a vehicle and told him to put his arms behind his back. Madarash responded, "F*** you, I am not going to jail." RP (June 11, 2014) at 77. Kelly radioed for backup and took Madarash to the ground where he attempted to handcuff him. At first, Madarash refused to put his hands behind his back and continued to yell at Kelly. He yelled, "You're a f***ing pig and I will kick your ass." RP (June 11, 2014) at 79.

After Kelly handcuffed Madarash, officers Tori Shelton and Chris Angel arrived to assist. They escorted Madarash to Kelly's patrol car. Madarash refused to get in the patrol car and told Angel and Shelton that he was not going to jail. When they began forcing Madarash inside the car, Madarash looked directly at both officers and screamed, "I'm gonna f***ing kill you." RP (June 11, 2014) at 101, 119.

The State charged Madarash with felony harassment against a criminal justice participant for his threat to Kelly and two counts of felony harassment for his threats to kill Angel and Shelton.

Kelly testified at trial that at the time Madarash threatened him, he was afraid that Madarash might follow through on his threat because he did not know what was in Madarash's pockets, Madarash was not in handcuffs yet, and Madarash was actively resisting. Kelly believed that Madarash "could have easily tried to have done something, grabbed something, a weapon or anything like that." RP (June 11, 2014) at 79.

Shelton and Angel testified that they did not fear that Madarash had the present ability to carry out his threat to kill them, but that they were afraid that he might carry out the threat in the future. Both believed that Madarash's threat was serious.

A jury found Madarash guilty of felony harassment of Kelly and guilty of the lesser included offenses of harassment by threat of bodily injury of Shelton and Angel. Madarash appeals his convictions.

ANALYSIS

A. STANDARD OF REVIEW

Madarash challenges the sufficiency of the evidence presented on both forms of harassment. The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the fact at issue beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In evaluating a sufficiency of the evidence claim, we assume the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 106. We defer to the trier of fact's resolution of conflicting testimony and evaluation of the persuasiveness of the evidence. *Id.*

B. LEGAL PRINCIPLES

1. Harassment by Threat of Bodily Injury

A person is guilty of the crime of harassment by threat of bodily injury if that person, (a) without lawful authority, knowingly threatens to "cause bodily injury immediately or in the future to the person threatened or to any other person", and (b) "by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW

9A.46.020(1)(a)(i), (b). This offense is a gross misdemeanor. RCW 9A.46.020(2)(a).

Harassment becomes a felony if the person threatens to kill the threatened person. RCW 9A.46.020(2)(b)(ii). Harassment also becomes a felony if the person "harasses a criminal justice participant who is performing his or her official duties at the time the threat is made." RCW

9A.46.020(2)(b)(iii). However, “the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances” and “[t]hreatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat.” RCW 9A.46.020(2)(b).

2. True Threat

RCW 9A.46.020 proscribes only “true threats.” *State v. Boyle*, 183 Wn. App. 1, 7, 335 P.3d 954 (2014), *review denied*, 184 Wn.2d 1002 (2015). 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 person.” *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004) (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001)). A statement can constitute a true threat even if the speaker has no actual intent to cause bodily injury. *Kilburn*, 151 Wn.2d at 46. A true threat is one that arouses fear in the person threatened, and that fear does not depend on the speaker’s intent. *Id.* Therefore, a statement will be considered a true threat if a “reasonable speaker would foresee that the threat would be considered serious.” *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

C. FELONY HARASSMENT OF A CRIMINAL JUSTICE PARTICIPANT

Madarash argues that the evidence was insufficient to convict him of felony harassment because a reasonable criminal justice participant would not interpret his words as a threat or believe that he had the present ability to carry out a threat. We disagree.

Kelly testified that he was afraid that Madarash would carry out his threat to injure him. He explained the reasons for his fear: he did not know what was in Madarash’s pockets,

Madarash was not in handcuffs yet, and was Madarash was actively resisting. As a result, Kelly believed that Madarash could have grabbed a weapon and injured him.

Viewing Kelly's testimony in a light most favorable to the jury's verdict, we hold that sufficient evidence supported findings that Kelly's fear was reasonable and that Kelly reasonably believed that Madarash had the present ability to carry out the threat. Accordingly, we affirm Madarash's conviction for felony harassment.

D. MISDEMEANOR HARASSMENT

Madarash argues that the evidence was insufficient to convict him of misdemeanor harassment of Officers Shelton and Angel because the only alleged threat was a threat to kill, which the jury rejected when it found him not guilty of felony harassment. Madarash also argues that there was insufficient evidence that his threat placed the officers in reasonable fear that he would injure them or that he had a present or future ability to carry out the threat. We disagree.

First, that the jury found Madarash not guilty of the felony charge indicates only that it did not believe that Madarash actually intended to kill Shelton and Angel. That finding did not foreclose the jury from concluding that Madarash meant only that he was going to injure the officers rather than kill them. Such a conclusion is inherent in the jury finding Madarash guilty of the lesser included offenses of harassment by threat of bodily injury of Shelton and Angel.

Second, both Shelton and Angel testified that they feared that Madarash would carry out his threat in the future. Shelton testified that the anger and rage with which Madarash made his threat caused him serious concerns. The threat appeared sincere to him. In addition, the fact that Madarash had physically resisted Kelly, even though Kelly was bigger and stronger than Shelton, caused him to fear that Madarash would try the same thing with him. Finally, Shelton expressed concern because Longview is a fairly small town and Madarash easily could find him.

Angel also testified that Madarash was angry and upset and that the threat appeared serious. He testified that he was afraid that Madarash might do something in the future because Madarash was looking at him and officer Shelton in the eye and was very direct and pointed in what he said. Angel believed that Madarash meant what he said and “that someday he was gonna see me out on the street and I don’t know what’s gonna happen, but he said he’s gonna kill me, so I have to assume the worst.” RP (June 11, 2014) at 120.

Viewing the officers’ testimony in a light most favorable to the jury’s verdicts, we hold that sufficient evidence supported a finding that Shelton’s and Angel’s fear was reasonable and that they reasonably believed that Madarash had the future ability to carry out the threat. Accordingly, we affirm Madarash’s two convictions for misdemeanor harassment.


We affirm Madarash’s convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

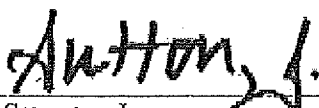


MAXA, J.

We concur:



MELNICK, J.



SUTTON, J.

TILLER LAW OFFICE

March 17, 2016 - 4:56 PM

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