

No. 47888-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH NICKOLS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUE

- A. Did the State present insufficient evidence to sustain Nickols' conviction for Harassment – Criminal Justice Participant Performing Official Duties?

II. STATEMENT OF THE CASE

On May 26, 2015 Joseph Nickols, an inmate at the Lewis County Jail, attempted to send a letter to Lori Heller, his girlfriend. RP¹ 92, 96; Ex. 1. The letter detailed Nickols' desire to set up a drug dealing business and how Ms. Heller needs to meet with people so they can be ready to sell when he gets out of jail in seven days. Ex. 1. The letter also talks about an associate in jail who has access to a .40 caliber gun and that Nickols wants to put out a hit on "Cory." RP 101; Ex. 1.

Officer Jack Haskins from the Lewis County Jail intercepted Nickols' letter to Ms. Heller as part of Officer Haskins' duties as the classification and compliance officer for the jail. RP 92, 95-96. Officer Haskins read the letter and forwarded it to Lewis County Sheriff's Office Detective Gene Seiber. RP 88, 96-97.

After reading the letter, Officer Haskins had Kari Lupo, a support technician at the Lewis County Jail, draft a notice of

¹ There are two separately paginated verbatim report of proceedings. The report of proceedings that contains the jury trial the State will cite to as RP. The other report of proceedings that contains the motion to dismiss, ER 404(b) hearing and the trial confirmation the State will cite to as MRP.

restricted mail. RP 101, 114-15; Ex. 3. Per the normal Lewis County Jail protocol, Ms. Lupo created the notice. RP 101, 114-15; Ex. 3. Ms. Lupo signed the notice with her name and Officer Haskins' name as the person authorizing Nickols' letter to be withheld. RP 101, 114-15; Ex. 3. The Notice of Restricted Mail states that Nickols' outgoing mail to Lori Heller was restricted. Ex. 3. The notice informs Nickols that the "**LETTER HAS BEEN TURNED OVER TO DETECTIVES FOR POSSIBLE CRIMINAL CHARGES**". Ex. 3 (emphasis original). The notice also list K. Lupo per Ofc. Haskins as the person who issued the notice. Ex. 1.

On May 28, 2015 Officer Haskins had another letter from Nickols on his desk. RP 103; Ex. 2. Officer Haskins read the letter. RP 105. Officer Haskins' initial reaction was that he needed to read the letter very carefully because the letter had a note in it that specifically was addressed to the officers who read Nickols' mail. RP 105. In the letter, Nickols wrote, "Fuck you punks reading this send that to the DA" RP 105; Ex. 2. The letter said,

You will never believe what this punk ass jail did now lol I got them fucken [sic] with my mail again and there [sic] sending my letter to the DA for criminal charges fuck you you punk as[s] Bitches hope and want to see you kids get raped and shoot in the head or hit by a car send that to the DA Bitch

Ex. 2. The letter also stated, “I need them to fuck up and send my letter to the DA now im [sic] going to shoot all who fucked with it with there [sic] own gun. lol” Ex. 2.

Officer Haskins testified the letter made him fearful because of the specificity of the threats. RP 106-07. Officer Haskins, a 31 year veteran, had been threatened 200 to 300 times in the past and felt this threat was different. RP 106-07. Officer Haskins also knew that Nickols was scheduled to be released within days of writing the May 28th letter. RP 107.

Ms. Lupo was made aware of the content in the May 28th letter when she began to read the information logs as part of her duties to prepare another Notice of Restricted Mail. RP 115-16, 122-23. Ms. Lupo became hysterical when she read what was contained within the letter because her name was on the Notice of Restricted Mail that was given to Nickols and she was “one of those people who messed with” Nickols’ mail. RP 123.

Nickols was originally charged with two counts of Harassment – Threat to Kill with a special allegation that he committed the offense against a law enforcement officer who was performing his or her official duties at the time of the incident. CP 1-2. Ultimately, the State filed a third amended information charging

Nickols with two counts of Harassment – Criminal Justice Participant Performing Official Duties. CP 35-37.

Nickols elected to have his case tried to a jury. See RP. Nickols was convicted as charged. RP 179; CP 86-87. Nickols was sentenced to 43 months on each count to run concurrently. RP 194; CP 97. Nickols timely appeals his conviction. CP 105-17.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT NICKOLS COMMITTED TWO COUNTS OF HARASSMENT – CRIMINAL JUSTICE PARTICIPANT PERFORMING OFFICIAL DUTIES.

Nickols argues the State did not present sufficient evidence to sustain the jury's verdict of guilty in regards to both counts of Harassment. Brief of Appellant 5-10. Nickols sole issue is that the State did not sufficiently prove that Kari Lupo and Jack Haskins were the object of Nickols' threats. The State presented sufficient evidence to sustain the jury's guilty verdict for Harassment.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have

found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Is Required To Prove Each Element Beyond A Reasonable Doubt And The State Did Such, Therefore, Presenting Sufficient Evidence To Sustain The Jury's Verdict For Harassment – Criminal Justice Participant Performing Official Duties.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221,

616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Nickols of Harassment – Criminal Justice Participant Performing Official Duties, the State was required to prove, beyond a reasonable doubt, that Nickols, on or about May 28, 2015, without lawful authority did threaten to cause bodily injury to, immediately or in the future, the person threatened, or any other person, and the person threatened was a criminal justice participant, and that the threat was made because of a decision made or an action taken by the criminal justice participant during the performance of his or her official duties. RCW 9A.46.020(1)(a)(i) and (2)(b)(iii); CP 35-36. The threat had to be made in a context or under such circumstances where a reasonable criminal justice participant would have reasonable fear under all the circumstances that the threat would be carried out,

and Nickols, by words or conduct placed Kari Lupo and Jack Haskins in reasonable fear the threat would be carried out. *Id.* Because the harassment statute criminalizes speech, the threat must be a true threat to overcome the protections of the First Amendment. *State v. Tellez*, 141 Wn. App. 479, 482-83, 170 P.3d 75 (2007). “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 take the life of another person.’” *Id.* at 482.

Nickols only disputes that there was insufficient evidence in regards to who the victim of his threats were. Nickols argument is that there was not sufficient specificity in regards to who was threatened and therefore, the State did not sufficiently show that the named victims, Jack Haskins and Kari Lupo, were knowingly threatened by Nickols. Because Nickols does not dispute that the State sufficiently proved the other elements of the Harassment charge the State will only address whether it presented sufficient evidence in regards to whether it proved Nickols knowingly threatened Kari Lupo and Jack Haskins. There was sufficient evidence presented to the jury to sustain the conviction.

Nickols argues because he did not use Kari Lupo or Jack Haskins' names in his letter that there is insufficient evidence that they were the object of his threat. Nickols goes as far to state, "we have threats broadly directed towards a group of people who *most likely* work at the Lewis County Jail." Brief of Appellant 8 (emphasis added). This statement is disingenuous because there is no way to view the evidence in the light most favorable to the State without admitting that the person(s) threatened by Nickols were working in the Lewis County Jail. See Ex. 2. The question is, did the State sufficiently prove Nickols threatened Ms. Lupo and Officer Haskins? The answer is, yes it did.

The evidence in this case was both direct and circumstantial and the jury was properly instructed that both types of evidence were equally valuable. CP 72, citing WPIC 5.01. The evidence of the threats were direct evidence, the jury was able to read, in Nickols' own words, the threats he was making. Ex. 2. The fact that Kari Lupo and Jack Haskins restricted Nickols' mail was also direct evidence. RP 101, 114-15. Ms. Lupo created a Notice of Restricted Mail, a copy of which was given to Nickols pursuant to jail policy. RP 101-02, 114-15; Ex. 3. The Notice of Restricted Mail contained a lot of important information. Ex. 3. The Notice informed Nickols

that his Mail to Ms. Heller was turned over to detectives for possible criminal charges. Ex. 3. The Notice states “By: K.LUPO PER OFC. HASKINS.” Ex. 3. Therefore, Nickols would have been informed that a K. Lupo restricted his mail after being directed to do so by Officer Haskins. Ex. 3. There was testimony from Officer Haskins that he and Nickols had a history. RP 95. Officer Haskins had personally dealt with Nickols before and had previously restricted Nickols’ mail before. RP 95.

Nickols had received the Notice of Restricted Mail after writing the May 26, 2015 letter to Lori Heller. RP 96-102; Ex. 1; Ex. 3. Therefore, when Nickols wrote the following in the May 28, 2015 letter, he did so knowing who was restricting his mail, reading his mail, and forwarding his mail to the authorities:

You will never believe what this punk ass jail did now lol I got them fucken [sic] with my mail again and there [sic] sending my letter to the DA for criminal charges fuck you you punk as[s] Bitches hope and want to see you kids get raped and shoot in the head or hit by a car send that to the DA Bitch

Ex. 2. Nickols knew the threat would be communicated to Officer Haskins and K. Lupo because the first thing that one read when they opened the letter was “Fuck you punks reading this. Send that to the DA” RP 105-06; Ex. 2.

It is not speculation, guess, or conjecture that Officer Haskins and Ms. Lupo were the object of Nickols' threats. Nickols argues there was no personalization in the letter in regards to Officer Haskins or Ms. Lupo. According to this logic, one can only be the victim of a harassment if they are actually named by the perpetrator. This clearly is not necessary. The letter was sufficiently specific. Nickols wanted to exact physical harm to the persons who were messing with his mail and he knew those people to be K. Lupo and Officer Haskins because they were the ones named on the Notice of Restricted Mail, and that notice had been given to Nickols.

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Nickols committed Harassment – Criminal Justice Participant Performing Official Duties and this Court should confirm his conviction..

IV. CONCLUSION

The State presented sufficient evidence to sustain Nickols' convictions for Harassment – Criminal Justice Participant Performing Official Duties. This Court should affirm Nickols' convictions.

RESPECTFULLY submitted this 20th day of April, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



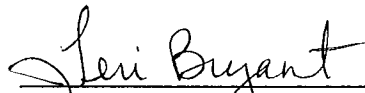
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. JOSEPH NICKOLS, Appellant.	No. 47888-9-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 20, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lisa Tabbut, attorney for appellant, at the following email address: ltabbutlaw@gmail.com.

DATED this 20th day of April, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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