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SUPREME COURT NO. 96454-8

NO. 50281-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THORMOD SKALD,

Petitioner.

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

The Honorable Leila Mills, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Thormod Skald, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Skald, ___ Wn. App. ___, ___ P.3d ___, 2018 WL 3572639 (No. 50281-0-II, filed August 7, 2018).¹

B. ISSUES PRESENTED FOR REVIEW

1. Skald was convicted of felony harassment for making a remark about shooting his ex-wife, Asta Gunnlaugsdottir, in the presence of two employees with whom he shared a "morbid and macabre" sense of humor. 1RP² 94-95, 124. Both employees acknowledged they had interpreted prior similar statements made by Skald as hyperbole. Where the evidence is insufficient to show that a reasonable person under these circumstances would have foreseen that Skald's comments amounted to a true threat expressing an intent to kill Gunnlaugsdottir, rather than idle talk or hyperbole, should review should be granted under RAP 13.4(b)(1) because the Court of Appeals opinion conflicts with precedent from this Court?

¹ A copy of the opinion is attached as an appendix. Skald's motion for reconsideration was denied on September 21, 2017.

² The index to the citations to the record is found in the Brief of Appellant (BOA) at 1, n.1.

2. Gunnlaugsdottir only learned about some of Skald's alleged statements from speaking with a detective. The specific statements conveyed from the detective to Gunnlaugsdottir about what Skald allegedly said were not admitted at trial, and Gunnlaugsdottir testified only that she took what Skald said, "very seriously". 1RP 145-46. Where the evidence is insufficient to prove that Skald's threat to kill Gunnlaugsdottir with a shotgun placed her in reasonable fear that the same threat to kill would be carried out, should review should be granted under RAP 13.4(b)(1), (b)(3), and (b)(4) because the Court of Appeals decision conflicts with precedent from this Court, involves a significant question of Constitutional law, and involves an issue of substantial public interest?

C. STATEMENT OF THE CASE

1. Trial Testimony.

Skald and Gunnlaugsdottir met in her home country of Iceland in 2006. They moved to the United States together in 2007, were married, and had two children. 1RP 141, 150. In 2010, Skald and Gunnlaugsdottir started an ice cream business. 1RP 142.

Skald hired Anjela Hasseries, Amber Golding, and Heather Uhling, as employees of the ice cream business. 1RP 84, 117, 161. Neither Hasseries nor Golding ever met or spoke with Gunnlaugsdottir. 1RP 85, 103, 117-20, 142-43.

Gunnlaugsdottir became increasingly depressed and isolated as her marriage with Skald continued. Gunnlaugsdottir described Skald as “controlling” and having a bad temper that resulted in him using “pretty bad words” when he felt confronted. 1RP 143-44, 148, 153. Skald never caused Gunnlaugsdottir any physical injury and never threatened her. 1RP 152-53.

Gunnlaugsdottir traveled to Iceland in 2014 in hopes of securing a loan for the ice cream business. 144-45, 151. After the loan was denied she decided she wanted to stay in Iceland and filed for divorce from Skald. 1RP 145. The divorce was finalized in 2015, but decisions on whether Skald or Gunnlaugsdottir would retain primary custody of the children remain unresolved. 1RP 85, 98, 118, 125, 131, 145, 148.

Both Hasseries and Golding testified positively on Skald’s behalf during the ongoing custody dispute. 1RP 85, 93-94, 131-33. Beginning in 2015, Skald began talking “constantly” about Gunnlaugsdottir. 1RP 86. He said that he would “be damned” if Gunnlaugsdottir left with their children again. 1RP 122-23, 129. Skald and Hasseries “joke[d]” about how hiring a hitman would be cheaper than hiring a lawyer. 1RP 86, 98-99. Hasseries, dealing with medical issues of her own, also joked about driving herself and Gunnlaugsdottir off a cliff. 1RP 95-98. As Hasseries explained, “It was something that – you know, a person would blow off

steam. He [Skald] was going through a lot at the time. So we would say it, we would laugh, and then we would move on.” 1RP 98-99.

In March 2016, Skald contacted Golding and asked if she knew anything about a plant that was used to make rosary beads. Skald said that he wanted figure out a way to extract the poison from the plant and use it to poison Gunnlaugsdottir. 1RP 118-19, 123-24. The comment was a “red flag” for Golding. 1RP 119. As Golding explained however, “I thought maybe he [Skald] was upset because he had lost the custody case, and so I just kind of filed it away and, you know, thought – tried to brush it off.” 1RP 119.

Sometime in July 2016, Skald asked Golding and Hasseries if they knew anything about chemistry. Skald explained that he had read an article where someone got dimethylmercury on their skin and the person died a short time later. 1RP 87, 120-21, 127. When Hasseries started to look up dimethylmercury on her cellphone, Skald told her not to because he did not want any of his friends connected. 1RP 87-88. Although “it became apparent that he [Skald] couldn’t get dimethylmercury[,]” Golding “kind of started to worry,” because Skald had researched the substance. 1RP 121.

In August 2016, Skald commented to Golding and Hasseries that he would just shoot Gunnlaugsdottir with a shotgun in the parking lot of

the courthouse when she appeared for a custody hearing. 1RP 86-87, 100, 121-22, 129. Golding never told Skald he should stop talking about killing Gunnlaugsdottir. 1RP 125. Golding also did not report any of Skald's comments to police. 1RP 125-28. In particular, Golding did not report Skald's comments about shooting Gunnlaugsdottir to police because she knew that Gunnlaugsdottir was in Iceland. 1RP 128.

Hasseries contacted police after being urged to do so by her therapist. 1RP 90, 101-03. Detective David Shurick interviewed Hasseries over the phone. 1RP 111-14. Shurick also spoke with Skald, Golding, and Gunnlaugsdottir. 1RP 112, 115. Shurick told Gunnlaugsdottir "what [he] had learned during [his] investigation." 1RP 112-13. Gunnlaugsdottir took Skald's statements "very seriously". 1RP 145-46. Shurick also collected a shotgun and shells from Skald's home. 1RP 113.

Hasseries explained that she began taking Skald's threats seriously once he developed a plan around June 2016. 1RP 90, 101-04. She testified that she believed had not she reported Skald's comments to police there was a good chance Gunnlaugsdottir would be dead. 1RP 91-92. Nonetheless, Hasseries acknowledged she had previously stated she was uncertain whether Skald had a specific intent to harm Gunnlaugsdottir. 1RP 92-93.

Golding did not believe Skald was joking when he made statements about harming Gunnlaugsdottir because Skald had thought out the various plans and researched them. 1RP 122. Golding could not say whether Skald really intended to carry out his threats or was “just blowing off steam[.]” 1RP 123-25.

Uhling denied that she had ever heard Skald threaten Gunnlaugsdottir. 1RP 164. Uhling explained that Skald had a dark sense of humor. 1RP 164. Although Skald seemed anxious and stressed, she did not believe that he was angry toward Gunnlaugsdottir. 1RP 163-64. Uhling explained that Skald told her Gunnlaugsdottir most likely would not appear personally at the custody hearing in September. 1RP 165.

Based on this evidence, the State charged Skald with three counts of felony harassment – domestic violence, for the three statements allegedly made between January 1, 2015 and August 30, 2016. CP 7-11; 1RP 3-6.

The first charged incident alleged that Skald threatened to kill Gunnlaugsdottir, with poison extracted from rosary beads. The second charged incident alleged that Skald threatened to kill Gunnlaugsdottir with dimethylmercury poisoning. The final charged incident, alleged that Skald threatened to kill Gunnlaugsdottir with a shotgun, and placed her in

reasonable fear that the threat to kill would be carried out. CP 7-11; 1RP 197, 200-05.

A jury did not reach a verdict on the first two charged incidents. 1RP 239, 245. The jury found Skald guilty of the third charged count of felony harassment -- domestic violence. 1RP 239-42; CP 42-54. The State subsequently dismissed the first two charges at sentencing. 2RP 6-7.

2. Court of Appeals Opinion.

Skald raised two arguments on appeal challenging the sufficiency of the evidence relied upon to convict him of felony harassment. First, Skald argued there was insufficient evidence that his statement allegedly threatening to shoot Gunnlaugsdottir with a shotgun amounted to a true threat within the meaning of the First Amendment. Second, Skald argued that the evidence was insufficient to prove that Skald's alleged threat to shoot Gunnlaugsdottir with a shotgun placed her in reasonable fear that that specific threat to kill would be carried out.

As discussed more fully below, the Court of Appeals rejected both of Skald's arguments. First, the Court of Appeals concluded that Skald's demeanor provided a sufficient basis on which to find that his statements amounted to a true threat. Appendix at 8-9.

The Court of Appeals also concluded that Gunnlaugsdottir's testimony supported a reasonable inference that she feared that Skald

would carry out his alleged threat to kill her because, "[a] person who did not fear that a threat would be carried out likely would not take the threat very seriously." Appendix at 10-11.

Skald now asks this Court to accept review and reverse the Court of Appeals.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW OF WHETHER SKALD'S STATEMENT CONSTITUTES A TRUE THREAT IS APPROPRIATE UNDER RAP 13.4(b)(1).

Due process requires the State to prove each element of a charged 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. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012), cert. denied, 133 S. Ct. 991, 184 L. Ed. 2d 770 (U.S. 2013). Crimes that have a threat to commit bodily harm as an element require the State to prove the threat was a "true threat" so as not to violate the First Amendment's free speech clause. State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001).

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 to inflict bodily harm or to take a life. Kilburn, 151 Wn.2d at 43. Communications that

“bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole” are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Whether a true threat has been made is determined under an objective standard that focuses on the speaker, not the listener. State v. Johnston, 156 Wn.2d 355, 361, 127 P.3d 707 (2006). “[T]he relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke.” Kilburn, 151 Wn.2d at 46; See also State v. Trey M., 186 Wn.2d 884, 906-07, 383 P.3d 474 (2016) (affirming standard set forth in Kilburn).

Here, the prosecutor specifically told the jury that Skald's alleged threat to shoot Gunnlaugsdottir with a shotgun was the act they should rely on to find Skald guilty of the third charged felony harassment charge. 1RP 197, 205. Thus, the State was required to prove that Skald's alleged comment that he was going to shoot Gunnlaugsdottir with a shotgun was a true threat. Considering the context in which the comment was made, Skald's statement was not a true threat.

Even if the plain meaning of the words used may appear to be a threat, the words may not amount to a true threat based on the context. For example, in N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the court held the N.A.A.C.P.

chairman's speeches, although the words purported to threaten violence, were protected speech because no harm actually resulted and because they were part of the passionate and highly charged political rhetoric of the civil rights movement. Id. at 926-29.

Similarly, in the case that gave rise to the definition of a true threat, Watts v. United States, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), Watts declared during a group discussion at an antiwar rally, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Watts and the others laughed after he made his statement. The U. S. Supreme Court reversed Watts' conviction for threatening the president, concluding that taken in context and considering the reaction of the listeners the statement was not a true threat. Id. at 706-08.

More recently, in Kilburn, this Court reversed a conviction for harassment based on a threat made to a school classmate. 151 Wn.2d at 38-39. In that case, K.J. came to school and told a friend, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first." Id. at 39. The friend thought he might be joking but was not sure. Id. As she thought about it more, she began to fear he was serious and told her parents, who called 911. Id. Despite the inherently alarming nature of K.J.'s statements, this Court found insufficient evidence of a true threat. Id. at 54.

First, this Court noted that K.J. had stated he was only joking and the trial court found him credible. Id. at 52. He testified that when he made the statement, he was with a group of students standing around chatting and giggling about a book involving guns and the military. Id. at 52. The friend confirmed that after he made the statement, K.J. began giggling as if he were not serious. Id. at 52. The friend testified that, at the time, she was not scared, but only surprised because, in the two years she had known him, K.J. had always treated her nicely. Id. at 52. Based on these facts, this Court concluded that a reasonable person in K.J.'s position would not reasonably foresee that the threat would be taken seriously. Id. at 53.

Kilburn mandates that courts consider the context in which the statements were made, the person or persons to whom the statements were made, and the relationships between the persons. 151 Wn.2d at 47, 51. Considering these factors, here the evidence shows a reasonable person would not foresee that Skald's statement to Hasseries and Golding included a serious expression to kill Gunnlaugsdottir.

Hasseries and Golding worked for Skald and knew he had a dark sense of humor. 1RP 94-95, 124. Hasseries in particular, had a "buddy-buddy" relationship with Skald that included a shared "morbid and macabre" sense of humor. 1RP 94-95. As Hasseries explained, she and

Skald would "kind of feed off each other" to see "who could tell the most sick joke". 1RP 94-95.

Both women also knew that Skald was in the midst of a difficult divorce and child custody dispute with Gunnlaugsdottir. On more than one occasion, Hasseries and Skald "joke[d] that it would be cheaper to hire a hitman than a lawyer[.]" 1RP 86, 98-99. As Hasseries acknowledged however, she clearly understood such statements by Skald to be jokes rather than threats to Gunnlaugsdottir: "It was something that -- you know, a person would blow off steam. He was going through a lot at the time. So we would say it, we would laugh, and then we would move on." 1RP 86, 98-99. On another occasion, Hasseries "joke[d]" about killing herself and Gunnlaugsdottir by driving her car off a cliff. 1RP 96-98.

Moreover, Golding was not timid about telling Skald when she believed certain comments made by him crossed the line into inappropriate. 1RP 124-25. Golding acknowledged that she never told Skald that his alleged comments about killing Gunnlaugsdottir, including shooting her, were inappropriate. 1RP 124-25.

Given Skald's particular relationship with Hasseries and Golding, the fact that prior similar statements involving Gunnlaugsdottir's death were admittedly taken as jokes, and that neither woman told Skald that his comments were inappropriate, a reasonable person in Skald's position

would not foresee that his comments about shooting Gunnlaugsdottir would be taken as a true expression of intent to kill Gunnlaugsdottir. Rather, from Skald's perspective, Hasseries and Golding could reasonably be counted on to understand that he was merely joking and venting his irritation about his marriage and child custody dispute and not actually threatening Gunnlaugsdottir. That tensions between Skald and Gunnlaugsdottir may have been elevated at the time does not render the otherwise innocuous statement a true threat. See Williams, 144 Wn.2d at 209-10 (recognizing that speech does not necessarily fit under the "narrow category" of a "true threat" simply because it conveys anger).

The Court of Appeals acknowledged that, "Notably, Hasseries and Skald had a particularly close relationship because they liked to share dark jokes with each other." Appendix at 8. But, the Court of Appeals went on to conclude that this relationship put Hasseries in a position to notice a change in Skald's demeanor and that, "Here, Skald's demeanor provided a basis to find that he planned to carry out the threat." Appendix at 8.

Contrary to the Court's conclusion however, neither Hasseries nor Golding testified specifically about any change in Skald's demeanor. Indeed, Hasseries and Golding provided inconsistent statements about whether they viewed Skald's comments as a true threat expressing an actual intent to kill Gunnlaugsdottir. 3RP 288-89; See State v. Alvarez, 74

Wn. App. 250, 260–61, 872 P.2d 1123 (1994) (evidence of subjective fear is a necessary but not sufficient component of the prosecution's proof), aff'd., 128 Wn.2d 1 (1995). Hasseries testified that "after a lot of time to reflect on it[,] she believed Skald intended to kill Gunnlaugsdottir. 1RP 91-93. During an interview conducted less than three weeks earlier however, Hasseries acknowledged she was uncertain whether Skald had a true intent to harm Gunnlaugsdottir and thought it possible that he was "just blowing off steam[.]" 1RP 92-93. Similarly, Golding testified that she "truly [didn't] know[.]" whether Skald had a homicidal intent toward Gunnlaugsdottir or was just "blowing off steam[.]" 1RP 125-26.

Significantly, Hasseries did not report any of Skald's alleged statements about killing Gunnlaugsdottir to police until more than a year after they were first made. Even then, Hasseries only contacted police at the urging of her therapist. 1RP 101-04. Despite questioning whether Skald's statements should be taken seriously, Golding never contacted police to report the statements herself. 1RP 125-28.

Because the Court of Appeals opinion is not supported by the record and conflicts with this Court's prior precedent, review is appropriate under RAP 13.4(b)(1).

2. REVIEW OF WHETHER SKALD'S STATEMENT ABOUT KILLING GUNNLAUGSDOTTIR WITH A SHOTGUN PLACED HER IN REASONABLE FEAR THAT THE SAME THREAT TO KILL WOULD BE CARRIED OUT IS APPROPRIATE UNDER RAP 13.4(b)(1), (b)(3), and (b)(4).

To convict a person for felony harassment based on threats to kill, the State must prove beyond a reasonable doubt that the defendant (1) without lawful authority (2) knowingly threatened to kill some other person immediately or in the future, and (3) the defendant's words or conduct placed the person threatened in reasonable fear that the threat to kill would be carried out. RCW 9A.46.020(1)(a)(i), (2)(b); State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003) (felony harassment statute requires victim to reasonably fear the threat *to kill* will be carried out, not just fear bodily injury will be inflicted) (emphasis added).

Skald relied on State v. C.G., to argue that the State failed to prove Gunnlaugsdottir was placed in reasonable fear that Skald's alleged threat to shoot her with a shotgun would be carried out. In C.G., this Court reversed a conviction for felony harassment, holding that “[i]n order to convict an individual of felony harassment based on a threat to kill, RCW 9A.46.020 requires that the State prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out.” C.G., 150 Wn.2d at 612.

C.G., a high school student, became angry and disruptive in class. The teaching assistant called the vice-principal, Tim Haney, who arrived and asked C.G. to leave with him. After some resistance, C.G. left, continuing to shout obscenities and stating, "I'll kill you Mr. Haney, I'll kill you." Haney testified that C.G.'s threat caused him concern and based on what he knew about C.G., she might try to harm him or someone else. Id. at 606-07. This Court concluded that there was no evidence that Mr. Haney was placed in reasonable fear that C.G. would actually carry out her threat and kill him. Id. at 610.

Here, Gunnlaugsdottir only "became aware of the things that the defendant [Skald] was saying" about her after speaking with Detective Shurick. 1RP 145. During that conversation, Shurick told Gunnlaugsdottir what he "had learned during [the] investigation." 1RP 112, 145-46. Significantly, neither Shurick nor Gunnlaugsdottir testified to the specific contents of what information Shurick shared with Gunnlaugsdottir. 1RP 112, 145-46. Thus, the jury was never presented with evidence as to which of the three specific alleged threats to kill, if any, that Shurick relayed to Gunnlaugsdottir.

The Court of Appeals rejected Skald's arguments that the lack of the specific threat made, and reasonableness of the subjective threat feared were insufficient to support the conviction for felony harassment.

Appendix at 10-12. The Court properly recognized that "[h]ere, Gunnlaugsdottir did not expressly testify that she feared Skald would carry out his threat to kill her." Appendix at 10. The Court of Appeals nonetheless concluded that Gunnlaugsdottir's testimony supported a reasonable inference that she feared that Skald would carry out his alleged threat to kill her because, "[a] person who did not fear that a threat would be carried out likely would not take the threat very seriously." Appendix at 10-11.

But there is no evidence that Gunnlaugsdottir reasonably feared that Skald would carry out his threat to kill her on the date, and in the manner described. Skald allegedly threatened to shoot Gunnlaugsdottir in the courthouse parking lot with a shotgun when she returned to the United States for a scheduled court hearing on September 2, 2016. 1RP 86-87, 100, 121-22. As Gunnlaugsdottir acknowledged however, by the time she spoke with Shurick, she already knew she was not going to be at the court hearing. 1RP 150. Skald had also never previously threatened to kill Gunnlaugsdottir with a shotgun or by any other means. 1RP 153. And while Skald had once hit Gunnlaugsdottir in the back during their marriage, there was no injury, and Skald was never again physical with her. 1RP 152; Compare State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999) (The victim's knowledge of the defendant's prior violence is

relevant to question of reasonable fear). Without any context as to which specific threats to kill Shurick relayed to Gunnlaugsdoittir, the State cannot prove that she was placed in reasonable fear that *the threat made is the one that will be carried out*. RCW 9A.46.020(1)(a)(i), (2)(b) (emphasis added).

To infer as the Court of Appeals did, that because Gunnlaugsdottir took Skald's non-specified threats "very" seriously means that she feared Skald would kill her, diminishes the State's requisite burden of proof. A specific fear that the person threatened will be killed is what distinguishes felony harassment from lesser misdemeanor harassment. RCW 9A.46.020(1)(a)(i), (2)(b). C.G. makes clear that insufficient evidence exists for felony harassment when there is an absence of any testimony that the threat feared is the specific threat to kill. 150 Wn.2d at 609-10.

The Court of Appeals opinion makes no attempt to distinguish C.G.. Appendix at 10. Instead, the Court attempts to circumvent C.G. by inferring that because Gunnlaugsdottir testified she took the threats very seriously, means that she was afraid Skald would kill her instead of merely harming her. Appendix at 10-11. In the absence of any testimony as to the context of the threats conveyed to Gunnlaugsdottir, or explicit testimony that she believed Skald would kill rather than merely harm her, however, this is not a reasonable inference but post hoc conjecture that

places the burden on Skald to prove either the absence of the specific threat made or that Gunnlaugsdottir's fear was unreasonable. Such an inference also ignores the clear holding of C.G. and means Skald could have been convicted of felony harassment despite the absence of any evidence that Gunnlaugsdottir specifically feared Skald would kill her.

Equally problematic is the Court of Appeal's refusal to address Skald's argument that the State was required to prove that Gunnlaugsdottir feared that Skald would kill her with a shotgun rather than in some other way. Appendix at 11, n. 1. The Court's opinion suggests that Skald did "not support this suggestion with any argument or authority[.]" Id.

But, Skald specifically cited to RCW 9A.46.020(1)(a)(i), (2)(b) and C.G., in support of the argument that to obtain a felony conviction based upon a threat to kill, the State must prove the threat made and the threat feared are the same. See BOA at 16-21; RBOA at 4-5. As this Court noted in C.G., "the words 'the threat' are key to the statute's meaning." 150 Wn.2d at 609. Thus C.G. concluded that "the State must prove that the person threatened was placed in reasonable fear of the 'the threat' -- the actual threat made." Id.

To conclude that Gunnlaugsdottir need not fear Skald's specific threat to kill her with a shotgun as opposed to some other means not only overlooks C.G. and RCW 9A.46.020(1)(a)(i), (2)(b), but also, ignores the

jury's inability to reach verdicts on the two other charged incidents. 1RP 239, 245; 2RP 6-7. Where, as here, Skald was charged with three separate felony harassments based on three distinct threats to kill, but the jury returned a guilty verdict only as to the threat to kill with a shotgun necessarily means that the State was required to prove Gunnlaugsdottir reasonably feared that specific threat. To suggest otherwise would mean that Skald could have been convicted by a non-unanimous jury based on other specific threats to kill that were subsequently dismissed by the State.

Because the Court of Appeals decision is not supported by the record, conflicts with this Court's prior precedent, involves a significant question of Constitutional law, and involves an issue of substantial public interest, review is appropriate under RAP 13.4(b)(1), (b)(3), and (b)(4).

E. CONCLUSION

Because Skald satisfies the criteria under RAP 13.4(b)(1), (b)(3), and (b)(4), this Court should grant review and reverse the Court of Appeals.

DATED this 19th day of October, 2018.

Respectfully submitted,

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APPENDIX

August 7, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

THORMOD NMI SKALD,

Appellant.

No. 50281-0-II

UNPUBLISHED OPINION

MAXA, C.J. – Thormod Skald appeals his conviction of felony harassment – threat to kill with a special allegation of domestic violence regarding a threat he made to kill his former wife. We hold that the State presented sufficient evidence to establish that (1) Skald made statements that amounted to a true threat and (2) Gunnlaugsdottir was placed in reasonable fear that Skald would carry out his threat. We also hold that the claims Skald makes in a statement of additional grounds (SAG) lack merit. Accordingly, we affirm Skald’s conviction.

FACTS

Skald and Asta Gunnlaugsdottir met and married in Iceland in 2007 before moving to the United States. They subsequently had two children. They moved to Poulsbo in 2011 and opened an ice cream shop together. Gunnlaugsdottir eventually started feeling depressed and uncomfortable in the marriage. She testified that Skald was controlling and had a bad temper. On one occasion, Skald struck Gunnlaugsdottir across the back.

In 2014, Gunnlaugsdottir went with the children to Iceland in an attempt to secure a loan for the ice cream business. While she was in Iceland, Gunnlaugsdottir decided that she wanted a

divorce. She filed for dissolution of the marriage in Washington in December 2014. The dissolution action involved ongoing custody issues.

While the dissolution action was pending, Skald constantly discussed Gunnlaugsdottir with the ice cream shop's employees, Anjela Hasseries and Amber Golding. Skald and Hasseries were close and shared a dark sense of humor. Hasseries testified that Skald first brought up problems with Gunnlaugsdottir in May 2015. Skald and Hasseries initially joked that hiring a hitman would be cheaper than hiring a lawyer. And Hasseries, who had medical issues at the time, joked that she could take Gunnlaugsdottir with her in a car and drive off a cliff. Hasseries testified that Skald was going through a lot and their jokes were a way to blow off steam. She explained, "So we would say it, we would laugh, and then we would move on." Report of Proceedings (RP) at 86.

Eventually, Skald's discussions turned more serious. In March 2016, he told Golding that he wanted to poison Gunnlaugsdottir with the extract of a plant used to make rosary beads. This raised a red flag for Golding, but she tried to brush it off. She thought he was just angry about his custody issues.

In July, Skald talked to Hasseries about poisoning Gunnlaugsdottir with dimethylmercury after watching a documentary in which a woman died a few months after getting that substance on her skin. Skald said that he could get some dimethylmercury on Gunnlaugsdottir's skin, and then she would die after returning to Iceland and the death could not be traced to him. Hasseries was "really creeped out" by this conversation. RP at 88. Skald had a similar conversation with Golding in June or July about exposing Gunnlaugsdottir to dimethylmercury, and about researching how to make it.

Early that summer, Skald also told Hasseries that he planned to shoot Gunnlaugsdottir with his shotgun. He said that if things did not go his way at a September custody hearing, he would shoot Gunnlaugsdottir in the courthouse parking lot afterwards. Hasseries did not think Skald was joking when he discussed the shotgun plan because it was very specific.

Skald also told Golding in August that he would like to kill Gunnlaugsdottir with his shotgun in the courthouse parking lot. According to Golding, Skald said, "I'll be damned if that bitch leaves with my kids again." RP at 122-23. Golding testified that she did not get the impression he was joking when he was talking about killing Gunnlaugsdottir. She thought he was serious, and she was concerned because he had thought out and researched plans.

Hasseries reported her conversations with Skald to law enforcement on August 23. She testified that she "wanted to wait until I was absolutely certain" before making the report. RP at 102. Hasseries testified that if she had not reported what had occurred, she believed that "there's a very good chance that [Gunnlaugsdottir] would be dead today." RP at 92.

Hasseries spoke with detective David Shurick. Shurick also interviewed Golding and Skald. On August 30, Shurick notified Gunnlaugsdottir of the criminal investigation. Because Gunnlaugsdottir was in Iceland at the time, they communicated by video call. Shurick testified that he told Gunnlaugsdottir what he learned during his investigation, but he did not otherwise testify about what was said during the conversation.

Gunnlaugsdottir explained that she became aware of statements Skald made about her when her attorney notified her that reports had been made to the police. She also testified that she spoke to a law enforcement officer about the issue, although she did not state specifically what she learned regarding Skald's statements. Gunnlaugsdottir did not expressly state that she

feared that Skald would carry out some threat, but she testified that she took what Skald had said very seriously.

Gunnlaugsdottir also testified that there was a scheduled custody hearing on September 2, 2016. But she had not been sure if she would be able to make that date because of immigration issues, and by the time she talked to Shurick she already knew that she would be unable to attend the hearing. Even so, she still planned on returning to the United States at some point and Skald was aware of her plan.

The State charged Skald with three counts of felony harassment – threat to kill, each with a special allegation of domestic violence. Each count referenced one of Skald’s three alleged threats to kill Gunnlaugsdottir: with rosary bead extract, with dimethylmercury, and with a shotgun. After Skald was arrested, Shurick seized a shotgun and some shells from Skald’s home.

At trial, Hasseries, Golding, Shurick, and Gunnlaugsdottir testified to the facts recited above. The jury found Skald guilty of the third felony harassment count, relating to the threat to kill Gunnlaugsdottir with a shotgun. The jury did not reach a verdict on the first or second counts. The trial court declared a mistrial on those two counts, and the State subsequently dismissed them.

Skald appeals his conviction.

ANALYSIS

A. LEGAL PRINCIPLES – HARASSMENT

Under RCW 9A.46.020(1), 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.

Harassment is a gross misdemeanor unless the harassment involves “threatening to kill the person threatened or any other person.” RCW 9A.46.020(2)(b)(ii). Harassment involving a death threat is a class C felony. RCW 9A.46.020(2)(b).

1. True Threat Requirement

RCW 9A.46.020 criminalizes pure speech. *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). But the First Amendment to the United States Constitution prohibits laws that abridge the freedom of speech. *Id.* at 41-42. Therefore, the harassment statute must be applied in conformance with the First Amendment. *Id.*

First Amendment protection does not extend to certain unprotected speech, including “true threats.” *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). As a result, we interpret RCW 9A.46.020(1)(a) as prohibiting only unprotected true threats. *Id.*

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.’ ” *Id.* (quoting *Kilburn*, 151 Wn.2d at 43) (internal quotation marks omitted). However, a communication using the wording of a threat but which in fact is merely a joke, idle talk, or hyperbole is not a true threat. *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Courts identify a true threat using an objective standard that focuses on the speaker. *State v. Johnston*, 156 Wn.2d 355, 360-61, 127 P.3d 707 (2006).

A statement can constitute a true threat even if the speaker has no actual intent to carry out the threat. *Kilburn*, 151 Wn.2d at 46. This is because a true threat arouses fear in the person threatened, and that fear does not depend upon the speaker’s intent. *Id.* The only question is

whether a reasonable speaker would foresee that the threat would be considered serious.

Schaler, 169 Wn.2d at 283.

2. Reasonable Fear Requirement

Under RCW 9A.46.020(1)(b), the defendant's words or conduct must place the person threatened in reasonable fear that the threat will be carried out. This provision involves four general requirements.

First, the person threatened must find out about the threat, although the defendant need not communicate the threat directly to the victim and conveyance of the exact words of the threat to the victim is not required. *State v. Trey M.*, 186 Wn.2d 884, 905-06, 383 P.3d 474 (2016), *cert. denied*, 138 S. Ct. 313 (2017). The defendant need not know that the threat will be communicated to the victim. *Id.* at 906.

Second, the person threatened must subjectively fear that the threat will be carried out. *See State v. Cross*, 156 Wn. App. 568, 582, 234 P.3d 288 (2010), *cause remanded on other grounds*, 172 Wn.2d 1009, 260 P.3d 208 (2011); *State v. E.J.Y.*, 113 Wn. App. 940, 953, 55 P.3d 673 (2002).

Third, the threat made and the threat feared must generally be the same. *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003).

Fourth, the victim's fear must be reasonable based on an objective standard, considering all the facts and circumstances of the case. *Cross*, 156 Wn. App. at 582; *E.J.Y.*, 113 Wn. App. at 953.

B. SUFFICIENCY OF EVIDENCE CLAIMS

Skald argues that the State did not present sufficient evidence that he made a true threat or that Gunnlaugsdottir reasonably feared that he would carry out the threat. We disagree.

1. Standard of Review

Ordinarily, 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 guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). When contesting the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Trey M.*, 186 Wn.2d at 905. Credibility determinations are made by the trier of fact and are not subject to review. *Id.* Circumstantial and direct evidence are equally reliable. *Id.* We apply this standard to the reasonable fear requirement.

However, because the true threat requirement implicates the First Amendment, we apply a more searching review to that requirement. *Kilburn*, 151 Wn.2d at 49. When assessing whether a statement is a true threat, we must engage in an independent review of the "crucial" facts that involve the legal determination of whether the speech is unprotected. *Id.* at 51-52. This review also may require us to look to the factual context in which the statement was made. *Id.* at 52. But we still defer to the fact finder on issues of credibility. *Id.* at 50.

2. True Threat Analysis

The question here is whether the State presented sufficient evidence that Skald's threat was made in a context or under such circumstances that a reasonable person would foresee that it would be interpreted as a serious expression of an intention to kill Gunnlaugsdottir. *See Allen*, 176 Wn.2d at 626. We hold that there was sufficient evidence of a true threat.

Skald told Hasseries and Golding of his three plans to kill Gunnlaugsdottir, including that he planned to shoot her with his shotgun in the courthouse parking lot. The threats came during

a dissolution and custody proceeding. While the dissolution action was pending, Skald constantly talked to Hasseries about Gunnlaugsdottir.

Although at first Hasseries and Skald were not serious when talking about hiring a hit man and driving Gunnlaugsdottir off a cliff, Hasseries began to take the threats seriously once Skald started talking about having an actual plan. Hasseries and Golding did not get the impression that Skald was joking when he started talking about killing Gunnlaugsdottir; they thought he was serious. And both employees testified that they were afraid that Skald would carry out his threat to shoot Gunnlaugsdottir.

The testimony of Hasseries and Golding is especially relevant in light of Skald's relationship with them. Notably, Hasseries and Skald had a particularly close relationship because they liked to share dark jokes with each other. This relationship put Hasseries in a position to notice a change in Skald's demeanor, and she took Skald's threats seriously once he developed an actual plan.

The Supreme Court cases addressing the true threat requirement have identified the impact context has on whether a statement constitutes a true threat. Relevant considerations include the manner in which the defendant made the threat, the defendant's relationship with the threatened person, and other indications that the defendant plans on carrying out the threat. *See Trey M.*, 186 Wn.2d at 906-08; *Schaler*, 169 Wn.2d at 291.

Here, Skald's demeanor provided a basis to find that he planned to carry out the threat. Hasseries testified that she noticed Skald became more serious when he talked about wanting to kill Gunnlaugsdottir. Further, Skald and Gunnlaugsdottir had a negative history during their marriage and Gunnlaugsdottir had filed for dissolution and had taken the children to Iceland. As a result, Skald had some motivation to threaten her. Skald's custody proceedings with

Gunnlaugsdottir gave him a motive to carry out his threat to kill Gunnlaugsdottir. Finally, Skald had detailed plans to carry out his threat.

Based on an independent review of the crucial facts presented, we hold that there was sufficient evidence to establish that Skald's threat to kill Gunnlaugsdottir was a true threat.

3. Reasonable Fear Analysis

We next consider whether the State presented sufficient evidence that Skald's threat to kill Gunnlaugsdottir placed her in reasonable fear that he would carry out his threat to kill her. RCW 9A.46.020(1)(b). We hold that the State presented sufficient evidence that Gunnlaugsdottir had such a fear.

a. Knowledge of Threat

First, we must determine whether Skald's threat to kill Gunnlaugsdottir was relayed to her. *Trey M.*, 186 Wn.2d at 905-06. The record does not show exactly what Gunnlaugsdottir knew about Skald's threats. But Gunnlaugsdottir testified that she became aware of Skald's statements after her attorney told her that reports had been made to the police, and she also stated that she talked with an officer. Shurick testified that he spoke with Gunnlaugsdottir and told her what he learned during his investigation.

There is no requirement that the exact words of the threat be communicated to the victim. *Id.* at 906. Viewing all evidence and inferences in the State's favor, the evidence here supports an inference that Shurick spoke with Hasseries and Golding and learned about Skald's threats from them, and then he informed Gunnlaugsdottir of Skald's threats to kill her.

b. Subjective Fear

Second, we must determine whether Gunnlaugsdottir subjectively feared that Skald would kill her. *Cross*, 156 Wn. App. at 582. In most cases involving the reasonable fear issue,

the threatened person had testified as to some level of fear. *See, e.g., Trey M.*, 186 Wn.2d at 905 (holding statements that threatened persons were “scared” was sufficient); *E.J.Y.*, 113 Wn. App. at 953 (statement of concern that the defendant would come back and “shoot up the place” was sufficient, as was another person’s statement that she felt “a little frightened”).

Here, Gunnlaugsdottir did not expressly testify that she feared Skald would carry out his threat to kill her. But she testified that she took Skald’s statements very seriously:

Q. . . . [W]ithout talking about what [Shurick] told you, did you take what the defendant had said seriously?

A. Yes. Very.

RP at 145-46.

Even though this evidence is minimal, we must view the evidence, including all reasonable inferences, in the light most favorable to the State. *Homan*, 181 Wn.2d at 105-06. Gunnlaugsdottir’s testimony that she took the threat seriously supports a reasonable inference that she feared that Skald would carry out the threat to kill her. A person who did not fear that a threat would be carried out likely would not take the threat very seriously.

c. Identity of Threat Made and Threat Feared

Third, we must determine whether there was sufficient evidence that Skald’s threat to kill Gunnlaugsdottir is the same threat that she feared. *C.G.*, 150 Wn.2d at 610. In *C.G.*, a vice principal was attempting to remove a disruptive student from her classroom when the student said that she would kill him. *Id.* at 606-07. The vice principal testified that the student’s comments caused him “concern” that the student might try to harm him or someone else in the future. *Id.* at 607. The court held that this was insufficient evidence to prove felony harassment because the vice principal did not testify that he feared the student would *kill* him. *Id.* at 610.

Here, Gunnlaugsdottir did not expressly testify that she feared that Skald would kill her. However, as noted above, it can reasonably be inferred that Gunnlaugsdottir was told about Skald's multiple threats to kill her and she stated that she took what he had said very seriously. The fact that Gunnlaugsdottir took Skald's threats to kill her seriously supports a finding that she was afraid he would kill her as opposed to merely harming her.¹

d. Reasonableness of Fear

Fourth, we must determine whether there was sufficient evidence Gunnlaugsdottir's fear that Skald would kill her was objectively reasonable. *Cross*, 156 Wn. App. at 582. Here, Skald had a specific plan to shoot Gunnlaugsdottir and also discussed killing her in other ways. He had a shotgun at his house, and it can be inferred that Gunnlaugsdottir knew that fact. Skald had a reason to be angry with Gunnlaugsdottir because she had filed for dissolution of their marriage and had taken their children to Iceland, and he had a bad temper and had hit her in the past. This evidence supports a finding that Gunnlaugsdottir's fear was reasonable.

Skald argues that Gunnlaugsdottir's fear was not reasonable because she did not hear of the threat from Skald himself or from Hasseries and Golding. But how a threatened person learns of the threat is immaterial. The court in *Trey M.* addressed a similar situation, in which the defendant told a school counselor that he wanted to shoot three classmates. 186 Wn.2d at 888-89. The classmates learned of the threat in various ways, including when one of them texted another. *Id.* at 890. The court rejected the defendant's argument that the classmates' fear was not reasonable because they did not hear the defendant's statements directly or indirectly. *Id.* at 906.

¹ Skald vaguely suggests that the State had to specifically prove that Gunnlaugsdottir feared that Skald would kill her *with a shotgun* rather than in some other way. But he does not support this suggestion with any argument or authority, and therefore we do not address this issue.

Skald also argues that Gunnlaugsdottir's fear was not reasonable because she knew that she would not be attending the September custody hearing when she learned of Skald's threat. But it was undisputed that Gunnlaugsdottir planned on coming back to the area at some point and that Skald knew of her plan. Skald does not identify any reason why it would not be reasonable for Gunnlaugsdottir to fear that he would carry out his threat at the first opportunity, rather than solely after the September hearing.

e. Summary

Drawing all reasonable inferences in the State's favor, a rational trier of fact could have concluded that Gunnlaugsdottir was told about Skald's threats to kill her, that she subjectively feared that he would carry out the threats, that what she feared was that he would kill her as opposed to merely harming her, and that her fear that Skald would kill her was objectively reasonable. Accordingly, we hold that the State presented sufficient evidence that Skald's threat to kill Gunnlaugsdottir placed her in reasonable fear that he would carry out his threat.

C. SAG CLAIMS


In a SAG, Skald asserts several grounds for reversing his conviction. However, Skald's SAG merely provides his analysis of the evidence presented at trial. He argues that the evidence against him was insufficient, certain evidence should have been given more weight, the witnesses who testified against him were mistaken or lying, and that his conviction was based on speculation.

We defer to the jury on questions of conflicting testimony, witness credibility, and persuasiveness of evidence. *State v. Rodriguez*, 187 Wn. App. 922, 930, 352 P.3d 200 (2015). Applying this principle, we reject Skald's SAG claims.

CONCLUSION

We affirm Skald's conviction.

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, C.J.

We concur:



WORSWICK, J.



LEE, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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