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64107

No. 64107-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HORACE GLENN GRAHAM,

Appellant.

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

APPELLANT'S REPLY BRIEF

ELAINE L. WINTERS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

MR. GRAHAM'S CONVICTION FOR FELONY HARRASSMENT MUST BE DISMISSED BECAUSE THE COURT DID NOT FIND AND THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. GRAHAM THREATENED TO KILL MR. STEWART

“In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Horace Glenn Graham argues on appeal that his conviction for felony harassment must be reversed because the trial court did not find that he threatened to kill Charles Stewart, an essential element of the crime. Brief of Appellant; CP 31-33.¹ While the State's response is not completely clear, the State appears to argue (1) one of the trial court's conclusions of law is really a finding of fact that supplies the missing factual finding, (2) the missing finding can be found in the court's oral ruling, or (3) this Court should remand the case for the entry of further findings of fact. Brief of Respondent.

First, the State argues that the trial court entered “appropriate findings” but listed them as conclusions of law. Brief of Respondent at 5. The State's discussion of cases does not provide

¹ The Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d), CP 31-33, are attached as an appendix to the Brief of Appellant.

guidance in addressing the issue here, as the cited cases do not address the failure of the trial court to enter a specific finding of fact necessary to establish an element of the crime. Brief of Respondent at 4-5; see Firefighters Local 1296, Intern. Ass'n of Firefighters v. Kennewick, 86 Wn.2d 156, 161, 542 P.2d 1252 (1975)² (stating when conclusion of law wrongly denominated a finding of fact, it is subject to appellate review; case is misquoted in response brief); State v. Washington Tug & Barge Co., 140 Wash. 613, 620-21, 250 Pac. 49 (1926) (appellate court may review conclusion reached by trial court from evidence that was not in serious dispute); Valentine v. Dep't of Licensing, 77 Wn.App. 838, 834-44, 846-47, 894 P.2d 1352, rev. denied, 127 Wn.2d 1020 (1995) (administrative agency finding of fact incorrectly designated

² The State misquotes this case. Addressing the appellant's challenge to the sufficiency of the evidence to support a factual finding, the Supreme Court said:

"We are firmly committed to the rule that the findings of fact of the trial court will not be disturbed on appeal if evidence is present in the record to support the findings." This rule is not of recent origin.

It is, however, the function of any appellate court to determine questions of law. If what is in fact a conclusion of law is wrongly denominated a finding of fact, it is, nevertheless subject to review.

86 Wn.2d at 161-62 (internal citations omitted) (quoting Sylvester v. Imhoff, 81 Wn.2d 637, 639, 503 P.2d 734 (1972)).

as conclusion of law reviewed for substantial evidence and upheld under APA).

The State does not specify which conclusion of law it believes supplies the missing finding of fact, but it can only be Conclusion of Law II. This conclusion of law states that the State proved all of the elements of felony harassment beyond a reasonable doubt and lists the elements. Conclusion of Law II. Stating that the government proved the elements of the crime beyond a reasonable doubt is not a factual finding that Graham threatened to kill Stewart. Conclusion of Law II is a legal conclusion, and this Court should reject the State's invitation to view it as a factual finding.

The State next argues that if the conclusion of law does not supply the missing factual finding, this Court should look to the trial court's oral ruling even though it was not incorporated by reference. Brief of Respondent at 5-6. The court's oral ruling, however, does not supply the missing factual finding. The State bases its argument on the trial court's statement that that he believed Stewart's testimony that he was stripped naked, felt threatened,

and was in reasonable fear for his life.³ RP 97-98. This does not establish that the court found Graham threatened to kill Stewart. Stewart's reasonable fear could easily have been engendered by Graham's possession of a handgun and use of it to hit Stewart on the head. Stewart explained he was afraid because Graham "cocked the gun, and his eyes, it looked like the devil or something, and I was scared for my life at that time." 6/8/09RP 138.

The State also refers this Court to Stewart's testimony. But the trial court was clearly not relying on Stewart's testimony alone. It was independent evidence, such as the police officer's testimony that he found clothing outside Graham's residence, that persuaded the court to believe a portion of Stewart's story, given the problems with the witness's credibility. RP 97-98; 6/8/09RP 65, 67-68, 80-81.

Appellate courts may not disturb credibility determinations made by the trial court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Here, the trial carefully crafted findings of fact based upon its determination of the credibility of the witnesses and did not find that Graham made threats to kill. This Court must assume the trial court's findings were intelligently made based upon the court's determination of the credibility of the witnesses before it.

³ The court made a written finding that Stewart was in reasonable fear, but not fear for his life. Finding of Fact at page 2, ¶ 8.

The superior court did not orally find that Graham threatened to kill Stewart, and this Court must assume the court meant what it said. Armenta, 134 Wn.2d at 14.

Finally, the State argues in the alternative that this Court should remand Graham's case to the superior court for the entry of further findings of fact. Brief of Respondent at 7-8. As argued in the Brief of Appellant, this case is distinguishable from State v. Alvarez, 128 Wn.2d 1, 904 P.2d 854 (1995). In Alvarez, the juvenile court failed to enter a finding on the "ultimate fact" that the victim's fear was reasonable. 128 Wn.2d at 19. The court, however, found the juvenile court's failure to enter a finding on that element was not due to the State's failure to meet its burden of proof but rather a poor choice of words, and thus remand for revision of the findings was appropriate. Id. at 19-20.

Here, in contrast, the court carefully considered the credibility of the witnesses and entered some findings based upon Stewart's version of the events and others based upon Graham's. The trial court's findings were intelligently entered based upon its determination of the credibility of the witnesses, and remanding the case for the entry of new findings is not appropriate.

B. CONCLUSION

This Court should reverse Mr. Graham's conviction for felony harassment and remand for the entry of a judgment of guilty of harassment, as supported by the trial court's findings.

Respectfully submitted this 14th day of July 2010.



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JENNIFER MILLER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] HORACE GRAHAM 5703 4 TH AVE S #155 SEATTLE, WA 98108	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 14TH DAY OF JULY, 2010.

X _____ *grd*

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710