

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.

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

BRIEF OF APPELLANT

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DIVISION ONE
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A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Horace Graham committed felony harassment based upon a threat to kill.

2. The trial court's findings of fact do not provide a factual basis for its conclusion that Mr. Graham was guilty of felony harassment based upon a threat to kill.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A defendant may not be convicted unless the State proves every element of the crime beyond a reasonable doubt. Mr. Graham was charged with felony harassment based upon a threat to kill, but the court's findings of fact state only that Mr. Graham threatened Charles Stewart and forced him to remove his clothing. Viewing the evidence in the light most favorable to the State, must Mr. Graham's conviction for felony harassment be dismissed in the absence of proof of a threat to kill?

2. The court finding a criminal defendant guilty is required to enter written findings of fact and conclusions of law that address each element of the offense. The trial court concluded Mr. Graham was guilty of felony harassment, but did not find that Mr. Graham threatened to kill Mr. Stewart, an essential element of the crime.

Where the evidence on this issue was in dispute, the finding cannot be inferred from other findings, and the court did not find a threat to kill in its oral ruling, must Mr. Graham's conviction for felony harassment be reversed?

C. STATEMENT OF THE CASE

The State charged Horace Glenn Graham with second degree assault on Charles Stewart and felony harassment based upon threats to kill Mr. Stewart. CP 16-17. Mr. Graham waived his right to a jury trial, and the case was heard by the Honorable James E. Rogers. CP 15. Mr. Graham and Mr. Stewart's accounts of the evening conflicted, and the court was required to determine the credibility of each witness. See RP 95-96, 97-98.¹ In so doing, the court noted the determination of the facts was made difficult by several witnesses' use of alcohol that evening. RP 93. The court found Mr. Graham not guilty of second degree assault and guilty of felony harassment. Conclusions of Law II-III.

Mr. Graham employed Mr. Stewart to help remodel Mr. Graham's Seattle property, which included a house and a garage.

¹ RP refers to the transcript containing the verbatim report of proceedings for June 9, June 10, July 10 and July 29, 2009. Other volumes will be referred to by date.

CP 31 (Findings of Facts at page 1, ¶ 1-2).² The two had a friendly relationship, and they were drinking together in Mr. Stewart's home during the evening of September 8-9, 2008. Id. Mr. Graham became convinced Mr. Stewart stole his wallet and money and confronted him. Findings of Fact at page 2, ¶ 3-4; RP 26, 29-30. Mr. Stewart normally carries a knife, and Mr. Graham believed Mr. Stewart was reaching in his pocket for his knife. Findings of Fact at ¶ 4. Mr. Graham therefore hit Mr. Stewart in the head with a pistol, and Mr. Stewart threw the stolen money on the ground. Findings of Fact at ¶ 5. Mr. Graham then forcibly escorted Mr. Stewart off the property. Findings of Fact at ¶ 5-7. The court found Mr. Graham not guilty of assault in the second degree based upon these findings, ruling the State had not disproved beyond a reasonable doubt that Mr. Graham acted in defense of himself and his property while in his own home. Conclusion of Law III.

The court, however, determined that Mr. Graham exceeded the reasonable behavior of one acting in self-defense once he and Mr. Stewart left Mr. Graham's property. Conclusion of Law II. The court found that once outside of his property, Mr. Graham forced

² A copy of the court's Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d), CP 31-33, are attached as an appendix. Because the findings of fact are unnumbered, they will be referred to by paragraph number.

Mr. Stewart to remove his clothing. Findings of Fact at ¶¶ 6-7. The court further found Mr. Stewart was “in shock,” “was threatened by Graham,” and that Mr. Stewart’s fear was reasonable. Findings of Fact at ¶¶7-8. The court therefore concluded Mr. Graham was guilty of felony harassment. Conclusions of Law II-III. Mr. Graham appeals. CP 34.

D. ARGUMENT

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

The trial court hearing Mr. Graham’s case carefully considered the testimony of several witnesses and weighed the credibility of each. The court then entered written findings of fact and conclusions of law finding Mr. Graham threatened Mr. Stewart, but the court did not find Mr. Graham made a threat to kill him. A threat to kill is a critical element of felony harassment, elevating it from a misdemeanor. Mr. Graham’s conviction for felony harassment must be reversed because the trial court did not find he made a threat to kill.

1. The State was required to prove every element of felony harassment beyond a reasonable doubt. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.³ Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I, § 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Mr. Graham was convicted of felony harassment, RCW 9A.46.020(1), (1). Conclusion of Law III. The felony harassment statute reads in relevant part:

³ The Fourteenth Amendment states in part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”

Article I, Section 22 provides specific rights in criminal cases. “In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury”

(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; or

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

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to this 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 electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically names in a no-contact or no-harassment order; or (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or another person.

RCW 9A.46.020(1), (2).

The amended information alleges Mr. Graham committed harassment by threatening to kill Mr. Stewart. CP 17. Thus, the elements of the crime are that (1) without lawful authority, (2) the defendant knowingly threatened to kill Mr. Stewart immediately or in the future, (3) the defendant's words and conduct placed Mr. Stewart in reasonable fear that the threat to kill would be carried out, (4) that the threat was a "true threat", and (5) the threat was made or received in the state of Washington. RCW 9A.46.020(1), (2); State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v C.G., 150 Wn.2d 604, 609, 80 P.3d 594 (2003). To convict Mr. Graham of felony harassment as charged, the State was therefore required to prove, among other elements, that Mr. Graham made a true threat to kill Mr. Stewart.

2. The trial court did not find Mr. Graham threatened to kill Mr. Stewart, an essential element of felony harassment. CrR 6.1(d) requires the court hearing a criminal trial to enter findings of fact and conclusions of law in order to permit the appellate court to review the questions raised on appeal. CrR 6.1(d); State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). Those findings must separately address each element of the crime, state whether it has been met, and provide a factual basis for each conclusion of

law. State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). The appellate court then determines whether substantial evidence supports each finding and, in turn, whether the findings support the conclusions of law. State v. Stevenson, 128 Wn.App. 179, 193, 114 P.3d 699 (2005). The appellate court reviews conclusions of law de novo. Id.

Here, after the court's oral ruling, the State prepared findings of fact and conclusions of law which the trial court entered with some changes. Findings of Fact and Conclusions of Law. Although the trial court found Mr. Graham guilty as charged in Count II, the court did not enter any factual findings describing a threat or determining that Mr. Graham threatened to kill Mr. Stewart. Instead, the court found Mr. Stewart "was ordered to strip down and was threatened by Graham." Findings of Fact at ¶ 7. The court also found Mr. Stewart's fear was reasonable, but did not find he was afraid he would be killed. Findings of Fact at ¶ 8.

The absence of a finding in favor of the party with the burden of proof on a disputed issue, here the State, is the equivalent of a finding against that party. State v. Ward, 125 Wn.App. 138, 145, 104 P.2d 61 (2005). Thus, the findings of fact in this case do not

support the court's conclusions that Mr. Graham threatened to kill Mr. Stewart and that he was guilty of felony harassment.

A trial court's oral ruling has no final or binding effect, and the oral ruling here is not incorporated into the written findings. Head, 136 Wn.2d at 622. In some cases, however, the appellate courts will look to the trial court's oral ruling to illuminate the written findings and conclusions. Ward, 125 Wn.App. at 145; State v. Bynum, 76 Wn.App. 262, 266, 884 P.2d 10 (1994), rev. denied, 126 Wn.2d 1012 (1995). The court's oral ruling here supports Mr. Graham's argument, as the trial court only found the elements of misdemeanor harassment were proven beyond a reasonable doubt. RP 96-98. The court did not state that Mr. Graham threatened to kill Mr. Stewart. Instead, the court orally found Mr. Graham was guilty of harassment because he threatened Mr. Stewart and forced him to remove his clothing outside of Mr. Graham's property. RP 98-98. Specifically, the court stated, "the threat was of bodily harm" and did not mention a threat to kill. RP 98.

Thus, the trial court's findings of fact show the trial court did not find Mr. Graham threatened to kill Mr. Stewart and thus do not

support the court's conclusion that Mr. Graham was guilty of felony harassment.

3. The error is not harmless beyond a reasonable doubt.

The State may argue this Court should affirm Mr. Graham's conviction because the court's omission of an element of the crime from its findings of fact is harmless beyond a reasonable doubt.

See Banks, 149 Wn.2d at 43-47. A constitutional error is harmless only if the State can demonstrate beyond a reasonable doubt the error did not contribute to the outcome of the trial. Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Banks, 149 Wn.2d at 44; State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

The Banks Court addressed a conviction for unlawful possession of a firearm in the first degree where the court's written findings of fact and conclusions of law did not include the element of knowledge, which a later appellate court opinion had announced was an essential element of the crime. Banks, 149 Wn.2d at 42-43. The defendant argued he was denied a trial where he could argue the knowledge element was not proved. Id. at 44.

The Supreme Court found the error was harmless in that case because the defendant had in fact contested the element of

knowing possession, because the court's finding that the defendant had picked up the firearm "clearly demonstrates that the court did consider Bank's knowledge," and because the trial court's findings necessitate an inference of knowledge. Banks, 149 Wn.2d at 46. Here, the opposite is true. The trial court's findings show the court found only a threat to commit bodily harm, not a threat to kill.

When, for example, the constitution harmless error test is applied to the omission of an essential element of the crime from the jury instructions, the error is harmless only if the element is supported by "uncontroverted evidence." Neder, 527 U.S. at 19; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Here, the evidence was far from uncontroverted. 6/8/09RP 202, 204, 208; 217; RP 36, 46. Instead, the elements of the crime were hotly contested, and the trial court made credibility determinations and entered factual findings. Concerning the harassment charge, the court found Mr. Stewart's testimony credible because it was supported by physical evidence, such as the photographs the police took of his clothing outside Mr. Graham's property. Findings of Fact at ¶ 6. There was no evidence to support Mr. Stewart's somewhat inconsistent testimony that Mr. Graham threatened to kill him. In fact, Mr. Stewart had to be prompted by the prosecutor via

leading questions to testify there was a threat to kill. 6/8/09RP 119-20, 133-38; RP 7. At one point Mr. Stewart said he was “too tired” to remember what Mr. Graham said to him. RP 6-7. This Court cannot conclude that Mr. Graham’s conviction for felony harassment based upon facts that support a conviction for misdemeanor harassment is harmless beyond a reasonable doubt.

4. Mr. Graham’s conviction for felony harassment must be reversed. Mr. Graham’s felony harassment conviction must be reversed because the trial court did not find beyond a reasonable doubt that Mr. Graham threatened to kill Mr. Stewart. See, Kilburn, 151 Wn.2d at 54 (reversing conviction for felony harassment in absence of evidence defendant’s statement was a true threat).

Remand for the entry of further findings of fact is not appropriate here. The Washington Supreme Court remanded a harassment conviction to juvenile court for the entry of additional findings of fact where the court had not specifically found the victim was placed in reasonable fear the threat would be carried out. State v. Alvarez, 128 Wn.2d 1, 904 P.2d 754 (1995). There, however, the court entered findings concerning the reasonableness of the fear, such as finding the victim was afraid and that the words of the threat were plain and spoken under circumstances that made

it a threat of bodily harm. Alvarez, 128 Wn.2d at 14-15. The Alvarez Court concluded remand was appropriate because the State had met its burden of proving the victim's fear was reasonable, but the court had simply made a poor "choice of words" in the findings. Id. at 15, 19.

Here, in contrast, the problem is not word choice; instead, the court did not find a threat to kill but merely a threat. In Mr. Graham's case, the trial court was required to make numerous credibility determinations, finding each of the key witnesses' testimony lacked credibility in certain areas. The court considered the case overnight before making its oral ruling and carefully checked the written findings of fact and conclusions of law prepared by the prosecuting attorney, making corrections. RP 91-98, CP 32-33.

When this Court dismisses a conviction based upon the lack of evidence of an element of the crime, it may remand for the entry of a judgment for a lesser-included offense. State v. Hutchins, 73 Wn.App. 211, 218, 868 P.2d 196 (1994). Here, the trial court found Mr. Graham threatened Mr. Stewart and Mr. Stewart was reasonably placed in fear the threat would be carried out. Findings of Fact at ¶ 7-8; Conclusion of Law II. Thus, the court entered

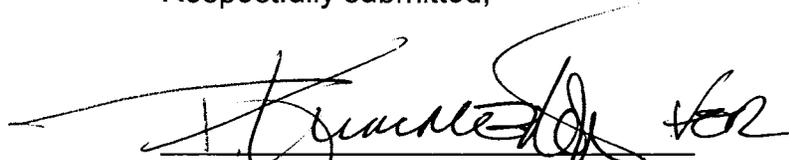
findings that support the conclusion Mr. Graham was guilty of harassment, RCW 9A.46.020(1)(a)(i), but not felony harassment, RCW 9A.46.020(2). This Court should reverse Mr. Graham's conviction for felony harassment and remand for the entry of a judgment of guilty of harassment, as supported by the trial court findings.

E. CONCLUSION

The trial court did not made a finding that Horace Graham made a threat to kill. He asks this Court to reverse his conviction for felony harassment.

DATED this 19th day of May 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Elaine L. Winters', with a long horizontal line extending to the left and a flourish to the right.

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

APPENDIX

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d)**

Filed July 31, 2009

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SEATTLE, WA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 08-1-11711-8 SEA
)	
vs.)	
)	FINDINGS OF FACT AND
HORACE GLEN GRAHAM,)	CONCLUSIONS OF LAW
)	PURSUANT TO CrR 6.1(d)
)	
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THE ABOVE-ENTITLED CAUSE having come on for trial from June 2, 3, 4, 8 and 9, 2008 before the undersigned judge in the above-entitled court; the State of Washington having been represented by Deputy Prosecuting Attorney Jennifer Miller; the defendant appearing in person and having been represented by his attorney, Robert Leen; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

The following events took place within King County, Washington:
The defendant Horace Graham and victim Charles Stewart were friends prior to September 8/9, 2008. Stewart had been employed by Graham to do some construction work at his home, located at 765 S. Homer Street.

The two spent time together on multiple occasions drinking socially at the residence prior to the night of the incident. For a period of time between five to six hours late on September 8 and early morning of September 9, 2008, the two were spending time socializing. They were drinking in the garage area of Graham's residence. Stewart had also been drinking earlier that day. Graham was drinking Henry's beer. They both left the garage at different times.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 1

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1 The court did not find Stewart's testimony credible with regard to his attempt to return
2 items of Graham's he found to Graham, and Graham "freaking out" on him, questioning him
3 about insurance papers. Instead the court found Graham's rendition of what occurred next
4 credible.

5 Graham determined that Stewart ^{appeared to} may have stolen items that belonged to him. He ^Q
6 reentered the garage, and took out a 40 caliber pistol which he had stored under his mattress
7 before confronting Stewart, who at first denied taking anything. Graham believed Stewart
8 reached for a knife he normally carries in his pocket.

9 After being hit in the head with the pistol, Stewart conceded that he took several items, ^{out of his pockets}
10 throwing them down at Graham's feet. The pistol is very heavy, and the blow caused injury to
11 Stewart's head. Graham took Stewart by the shirt, and basically escorted him with force from the
12 property. Graham, apparently feeling he had been betrayed by Stewart, also had his actions
13 influenced by alcohol. His confrontation with Stewart escalated. ^Q

14 Graham took Stewart out of the property via the gate. He indicated that he "helped"
15 Stewart leave the property. The court did not find this testimony credible, but instead found
16 Stewart's rendition of what occurred next credible. Graham told Stewart to take his clothes off.
17 This is evidenced by Stewart's testimony as well as pictures of various items of clothing
18 (including underwear and a shoe) taken by Seattle Police Department officers who responded to
19 the scene shortly after the incident. The court did not find Graham's rendition of facts in this
20 area credible, given that Stewart's underwear was found by police outside the fence line of
21 Graham's property. ^{The physical evidence includes}

22 When Stewart was outside the property he was in shock about the assault. He was
23 ordered to strip down and was threatened by Graham. This occurred outside the residence, and
24 outside the gated area of the property belonging to Graham. ~~It was at this point in time that~~
25 Graham exceeded his reasonable behavior as a home owner and exceeded the scope of acting in
26 self defense or defense of property. ^{while outside his property.}

27 Stewart was placed in fear based on the actions and threats made by Graham. This fear
28 was reasonable.

29 And having made those Findings of Fact, the Court also now enters the following:

30 CONCLUSIONS OF LAW

31 I.

32 The above-entitled court has jurisdiction of the subject matter and of the defendant
33 Horace Graham in the above-entitled cause.

34 II.

35 The following elements of the crime charged (Felony Harassment) were proven by the
36 State beyond a reasonable doubt:

37 ... that the defendant on September 8, 2008 knowingly and without lawful
38 authority did threaten to cause bodily injury immediately or in the future to
39 Charles Stewart, by threatening to kill him, and the words or conduct placed
40 Charles Stewart in reasonable fear that the threat would be carried out.

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III.

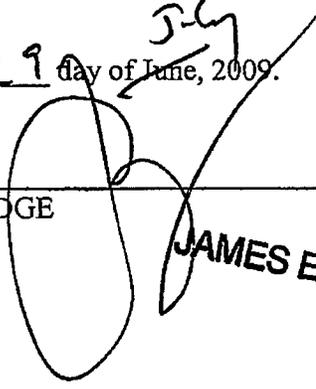
The defendant is guilty of the crime of **Felony Harassment** as charged in the Second Amended Information. *He is not found guilty of Count I, Assault Second Degree, as charged in the Second Amended Information. He acted in self defense and the state failed to disprove self defense beyond a*

IV.

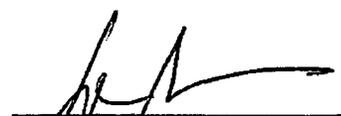
Judgment should be entered in accordance with Conclusion of Law III.

reasonable doubt. P

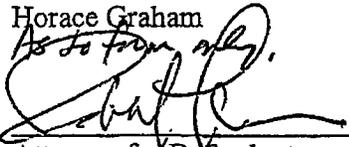
DONE IN OPEN COURT this 29^{July} day of June, 2009.

JUDGE

JAMES E. ROGERS

Presented by:


Deputy Prosecuting Attorney
Jennifer L Miller WSBA #31600

As to form, only

Defendant
Horace Graham
As to form, only.

Attorney for Defendant
Robert Leen # 14208

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64107-7-I
v.)	
)	
HORACE GRAHAM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MAY, 2010, I CAUSED THE ORIGINAL **OPENING 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:

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<input checked="" type="checkbox"/> HORACE GRAHAM 5307 4 TH AVE. S, #155 SEATTLE, WA 98108	(X) () ()	U.S. MAIL HAND DELIVERY _____

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SEATTLE, WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF MAY, 2010.

X _____ *gno*

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