

69209-7

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NO. 69209-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANIEL E. LUSE, Jr.,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

Evidence established that defendant had been in a relationship with Neuroth that ended after he assaulted her. Defendant told a mental health professional at the jail that he had lost his girlfriend, he did not want to live without her, and thought of taking her down with him. Defendant said he wanted closure on the situation that he was going to go out there with a gun, go in the house and wait until she gets home. The police communicated defendant's statement to Neuroth. She feared defendant would carry out his threat. Was the evidence sufficient for a rational trier of fact to find defendant guilty of felony harassment beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

Patricia Neuroth met Daniel Edward Luse, Jr., defendant, in 2011, when he was living at a recovery house across the street from where she lived in Everett. They became friends and began living together in Neuroth's house. They lived together for six to eight months. Defendant helped pay the rent. They moved from Everett to Arlington on January 1, 2012. Neuroth and defendant separated in February when he assaulted her. After they separated

Neuroth changed the locks on the doors, added a dead bolt, and put more lighting outside. 3RP 33, 74-76, 78, 81-82.

While he was in jail defendant requested to speak with a mental health professional about suicidal thoughts he was having. Elizabeth Bellmer contacted defendant at the Snohomish County Jail on March 11, 2012. Defendant reported, "I have thoughts in my head about suicide and harming myself after release. I can't sleep and I have sweats." He further reported, "I've lost my girlfriend, and my heart is broken. I basically don't want to live anymore without her." Defendant explained that he had been in an eight month relationship living with his girlfriend at her house and helping make payments. Defendant told Bellmer that he had been in treatment three times and "it hasn't helped." He again stated that his life was over. 3RP 18-20, 32-34, 38-41.

Defendant then told Bellmer:

I'm going to go out there with a gun. And I have a lot of ugliness in my head. I've had thoughts of taking her down with me. Bad thoughts. The devil is in my head and I can't get him out. I need closure on this situation to see if she lied to me. If she did, I'll go in the house and shoot him and wait until she gets home.

Bellmer considered defendant's statement a serious threat and was concerned for Neuroth's safety. She contacted the police. Bellmer

included defendant's threat verbatim in her report to the police. RP 34-38, 41-42, 50-51, 56-59, 62-63, 66.

On March 13, 2012, Deputy Covington contacted Neuroth at her Arlington residence to inform her about defendant's threat. He had reviewed Bellmer statement immediately prior to relating defendant's threat to Neuroth. Deputy Covington did not remember if he showed Neuroth Bellmer's statement, read it to her, or just told her what defendant said. He did not recall the exact words he used. Deputy Covington recalled telling Neuroth that defendant also threatened her boyfriend and recalled Neuroth replying that she did not have a boyfriend. Neuroth recalled that Deputy Covington related a statement defendant made when he was with mental health at the jail. She did not recall Deputy Covington exact words, but did remember that she was told that defendant said "he was going to get a gun and he was going to kill me and anybody else that was with me." 3RP 62-72, 76-77, 79-81.

When Deputy Covington related defendant's threat to her, Neuroth fell apart. She started crying and her body started trembling in fear. Neuroth knew that defendant had access to weapons and was afraid that defendant would come after her. 3RP 65, 77-80.

B. PROCEDURAL HISTORY.

On April 6, 2012, defendant was charged with harassment, domestic violence. CP 56-60.

The case proceeded to trial on July 2, 2012. At the conclusion of the State's case, defendant moved to dismiss. Defendant argued: 1) that the State had failed to prove that defendant threatened to kill Neuroth on or about March 12, 2012, because the threat was made on March 11, 2012; and 2) that Neuroth was not placed in reasonable fear by defendant's words, but instead by Deputy Covington's interpretation of what defendant had said. The court denied the motion. 3RP 84-87.

On July 3, 2012, the jury found defendant guilty as charged. Defendant was sentenced on July 5, 2012. CP 29, 46; 4RP 1-5.

Defendant's offender score was five with a standard sentencing range of 17 to 22 months. The court imposed 18 months confinement, followed by 18 months community custody, and ordered defendant to have no contact with Neuroth for five years. CP 14-24; 5RP 1-9.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT DEFENDANT GUILTY OF HARASSMENT.

Defendant argues the evidence was insufficient to support his conviction for harassment. Specifically that the evidence was insufficient to show 1) that defendant made a true threat to kill Neuroth (Appellant's Brief 4-6), and 2) that by his words or conduct defendant placed Neuroth in reasonable fear that the threat would be carried out (Appellant's Brief 6-8).

1. Legal Standards.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and

interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (“In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.”). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992), citing State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict).

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, the court must defer to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004); State v. Asaeli, 150 Wn. App. 543, 567, 208 P.3d 1136 (2009); Delmarter, 94 Wn.2d at 638; State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Where the sufficiency of the evidence question raised involves the essential First Amendment question—whether defendant’s statements constituted a “true threat” and therefore unprotected speech—the appellate court independently reviews the record. State v. Kilburn, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004). The independent review is limited to “those ‘crucial’ facts that necessarily involve the legal determination whether the speech is unprotected.” Id.

2. Harassment.

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens *** to kill the person threatened *** and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. ...

RCW 9A.46.020(1)(a), (b) and (2)(b)(i). See CP 38 (Jury Instruction 6, WPIC 36.07.02), CP 59-60 (Information).

The statute requires that the perpetrator knowingly threaten to kill the person threatened by communicating directly or indirectly the intent to kill; the person threatened must find out about the threat, although the perpetrator need not know that the threat will be communicated to the victim; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out. State v. J.M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001). As to the nature of the threat, whether or not the speaker actually intends to carry out the threat is not relevant. Kilburn, 151 Wn.2d at 48; J.M., 144 Wn.2d at 481-482, 488. However, the threat must be a “true threat.” J.M., 144 Wn.2d at 482.

To be a true threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

CP 40 (Jury Instruction 8, WPIC 2.24).

B. SUFFICIENT EVIDENCE WAS PRESENTED.

1. Defendant's Threat Was To Kill Neuroth.

Sufficient evidence was presented to show that defendant's threat to kill was directed at Neuroth. Defendant requested to speak with Bellmer about suicidal thoughts he was having while in jail. RP 19. After stating that he was having thoughts of suicide and harming himself after his release, defendant stated, "I've lost my girlfriend, and my heart is broken. I basically don't want to live anymore without her." RP 33. Defendant explained that he had been in an eight month relationship living with his girlfriend at her house and helping make payments. RP 33. Neuroth said that she and defendant had been together for six or seven month, maybe a little longer, that he helped pay the rent, and that they were no longer together after he assaulted her in February. RP 75-76. The evidence clearly showed that defendant was talking about Neuroth and a rational trier of fact could have so found.

2. Defendant Knowingly Threatened To Kill Neuroth.

Defendant spoke freely with Bellmer. RP 41. After stating that he did not want to live anymore without Neuroth, and repeating that his life was over, defendant said:

I'm going to go out there with a gun. And I have a lot of ugliness in my head. I've had thoughts of taking

her down with me. Bad thoughts. The devil is in my head and I can't get him out. I need closure on this situation to see if she lied to me. If she did, I'll go in the house and shoot him and wait until she gets home.

RP 34, 42.

A person acts knowingly¹ if he is aware of facts or circumstances or results described as a crime. RCW 9A.08.010(1)(b)(i). A jury is permitted to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists. State v. VanValkenburgh, 70 Wn. App. 812, 816, 856 P.2d 407, 410 (1993) citing State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992). Defendant was aware of the facts and circumstances of his statement. A rational trier of fact could have found defendant knowingly threatened to kill Neuroth.

3. Defendant Reasonably Foresaw That His Statement Would Be Interpreted As A Serious Expression Of Intention To Carry Out The Threat.

The court's independent review will confirm that in the context and under the circumstances when defendant made his statement, a reasonable person in defendant's situation would foresee that his statement would be interpreted as a serious

¹ The jury was instructed on the definition knowingly. CP 39 (Jury Instruction 7, WPIC 10.02).

expression of intention to carry out the threat, and not as something said in jest or idle talk. As noted, Bellmer considered defendant's statement a serious threat. She was concerned for Neuroth's safety and contacted the police. RP 34-36, 38, 50-51. There was sufficient evidence for a rational trier of fact to find that defendant reasonably foresaw that his statement would be interpreted as a serious expression of intention to carry out the threat rather than something said in jest or idle talk.

4. Neuroth Learned Of The Threat And Reasonably Feared That The Threat Would Be Carried Out.

"[T]he person threatened must find out about the threat ...; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out." J.M., 144 Wn.2d at 482. Defendant does not challenge that Neuroth reasonably feared defendant would carry out the threat communicated to her by Deputy Covington. Rather, defendant argues that it was not his words that placed Neuroth in fear, but instead, that it was Deputy Covington's interpretation of his threat that placed Neuroth in reasonable fear that the threat would be carried out. Appellant's Brief 6-8.

Here, defendant's threat was quoted verbatim in Bellmer's statement to the police. RP 41-42. Deputy Covington reviewed Bellmer statement immediately prior to relating defendant's threat to Neuroth. RP 64-65, 69. Neuroth recalled that Deputy Covington related a statement defendant made when he was with mental health at the jail. RP 77-79. Neuroth did not recall the exact words Deputy Covington used, but she remember that he told her that defendant said "he was going to get a gun and he was going to kill me and anybody else that was with me." RP 77, 80-81. The evidence was sufficient to show that defendant's threat, made in his comments to Bellmer, was accurately communicated to Neuroth. State v. C.G., 150 Wn.2d 604, 609, 80 P.3d 594 (2003). A rational trier of fact could have found defendant's words or conduct placed Neuroth in reasonable fear that his threat would be carried out.

C. A RATIONAL TRIER OF FACT COULD FIND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

Based on the evidence presented, a rational trier of fact could have found beyond a reasonable doubt that defendant, on or about March 12, 2012, knowingly threatened to kill Neuroth immediately or in the future; that defendant words or conduct placed Neuroth in reasonable fear that the threat to kill would be

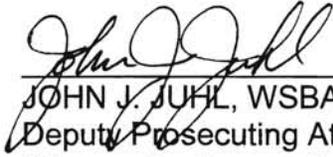
carried out; that defendant acted without lawful authority; and that the threat was made or received in Washington.

IV. CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

Respectfully submitted on April 16, 2013.

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