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No. 41546-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ALONZO LAMAR BRADLEY, SR.,

Appellant.

On Appeal from the Pierce County Superior Court

Cause No. 09-1-04682-6

The Honorable James Orlando, Judge

The Honorable Bryan Chushcoff, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Bradley's motion to dismiss the possession of a controlled substance charge for lack of evidence.
2. The State failed to prove beyond a reasonable doubt every element of the crime of possession of a controlled substance.
3. The trial court erred by denying Bradley's motion to dismiss the harassment charge for lack of evidence.
4. The State failed to prove beyond a reasonable doubt every element of the crime of harassment.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The State failed to prove the elements of unlawful possession of a controlled substance because there was insufficient evidence linking Bradley to the bag of cocaine found in the bushes. (Assignments of Error 1 & 2)
2. The State failed to prove the elements of harassment because there was insufficient evidence that Officer Eugley had any reasonable fear that Bradley could or would actually carry out his threat. (Assignments of Error 3 & 4)
3. The State failed to prove the elements of harassment

because there was insufficient evidence that Bradley could have foreseen that Officer Eugley might view his statements as a serious threat. (Assignments of Error 3 & 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Alonzo Lamar Bradley, Sr., by Information, with one count of unlawful possession of a controlled substance (RCW 69.50.4013), one count of felony harassment against a law enforcement officer (RCW 9A.46.020, RCW 9.94A.535), and one count of obstructing a law enforcement officer (RCW 9A.76.020). (CP 1-2, 124-25)

Following a CrR 3.5 and CrR 3.6 hearing, the trial court ruled that statements made by Bradley to the arresting officer, and evidence collected from the scene of the arrest, were admissible at trial. (09/07/10 RP 71-74; CP 12-32, 43-47, 48-52)¹

Bradley moved to dismiss the possession and harassment charges after the State rested its case-in-chief, arguing that the State's evidence did not prove the elements of those crimes. (RP5 338, 344-59) The trial court denied the motions. (RP5 353, 357-

¹ The transcripts of trial proceedings, labeled volumes 1 thru 7, will be referred to as RP#. The transcripts of pretrial and sentencing proceedings will be referred to by the date of the hearing.

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The jury convicted Bradley as charged. (RP7 557; CP 108-12) The trial court imposed an exceptional sentence totaling 72 months of confinement, based on two aggravating factors: (1) prior unscored misdemeanor history resulting in a presumptive sentence that is clearly too lenient; and (2) that the victim of the harassment was a law enforcement officer performing his official duties. (12/08/10 RP 58; CP 133, 136, 144-45, 151-52) This appeal timely follows. (CP 127)

B. SUBSTANTIVE FACTS

Officer Robert Eugley of the Fife Police Department was on patrol in his marked police car on the night of October 18, 2009. (RP4 183, 184, 185) At about 10:45 that night, Officer Eugley stopped for a red light at the intersection of Pacific Highway East and 54th Avenue East. (RP4 185) As the light turned green, and he began to drive northbound on 54th into the intersection, he noticed a man riding a bicycle eastbound on Pacific Highway towards the 54th Avenue intersection. (RP4 189, 190)

According to Officer Eugley, the cyclist rode through the parking lot on the northwest corner of the intersection, across the intersection outside the crosswalk and against the red light, turned

north and continued riding on the sidewalk of 54th Avenue. (RP4 191, 193-94, 195) Officer Eugley also noticed that the cyclist was not wearing a helmet and did not have a headlight or reflector on his bicycle. (RP4 195) Because cyclists are required to follow the rules of the road applicable to automobiles, and because they are also required to have illuminated headlamps during hours of darkness, Officer Eugley decided to contact the man and possibly issue a ticket for traffic infractions. (RP 195, 198, 215)

Officer Eugley slowed his patrol car and, from about 10 feet behind the cyclist, used his public address system to tell the cyclist: "Fife Police, stop." (RP4 195) The cyclist turned and looked back at the patrol car, but kept riding. (RP4 196) Officer Eugley activated his overhead lights and again ordered the cyclist to stop. (RP4 196, 197) The cyclist turned and yelled something to Officer Eugley, but he could not hear what was said. (RP4 197)

Officer Eugley continued to order the cyclist to stop, and the cyclist continued to ride. (RP 197, 198) Officer Eugley saw the cyclist reach into his left pocket and thought he might be reaching for a weapon. (RP 199) Officer Eugley dropped back, and requested a quick response from backup units. (RP 200)

Officer Eugley then announced to the cyclist that he was

under arrest for failing to stop for a police officer and for obstructing. (RP4 201) Officer Eugley heard the siren of a backup unit approaching. (RP4 202) According to Officer Eugley, the cyclist turned and looked towards the backup unit, then stopped his bike, got off, and threw it to the ground. (RP 202, 203)

Officer Eugley testified that the cyclist, who he identified as Alonzo Bradley, seemed angry and agitated, and had his left fist clenched. (RP4 203; RP5 219) Bradley yelled at the officer that he “didn’t stop at a store or motel in Fife[,]” and that the officer did not have authority to stop him. (RP5 203) Because the officer thought Bradley seemed aggressive, he drew his taser and ordered Bradley to the ground. (RP5 219-20) Bradley did not immediately comply, but did eventually turn, step over his bicycle, and lay down on the ground near some bushes. (RP5 221, 222)

According to Officer Eugley, Bradley pushed his hands into the bushes then pulled them back out. (RP5 225) Officer Eugley ordered Bradley to open his hand and Bradley complied, but his hand was empty. (RP5 225)

With the help of backup police officer Don Hobbs, Officer Eugley handcuffed Bradley, conducted a search for weapons and contraband, and placed Bradley into the patrol car. (RP3 101, 106;

RP5 226, 227, 228) While Officer Hobbs stayed with Bradley, Officer Eugley went back to the bushes and looked at the area where Bradley's hands had been. (RP3 110; RP5 227, 229) Officer Eugley testified that he reached into the bushes and found a small baggie containing an item that looked like crack cocaine.² (RP5 229, 230, 235) As Officer Eugley walked back to the car with the bag in his hand, Bradley yelled: "[T]hat is your cocaine. I saw you. You can't put that on me." (RP5 236)

Officer Eugley drove Bradley to the Pierce County Jail. (RP5 237) Bradley was angry about being arrested, and kept telling Officer Eugley that he did not have probable cause to stop and arrest him. (RP5 237, 238, 241, 319) According to Officer Eugley, Bradley repeatedly called him a "white boy" and a "pig," and told him that he would "get a 12-gauge shotgun shoved in [his] mouth and [his] head is going to be blown off." (RP5 241)

Bradley testified during the defense case, and explained that he was riding from work through Fife because it is the safest way to get to Federal Way. (RP6 361) He traveled this same route the night before, and had several interactions with police, which made him feel that they were targeting him or that they perhaps had

² The substance was later tested and determined to be cocaine. (RP3 154-55)

mistaken him for someone else. (RP6 367, 368, 393) But he was not detained or ticketed previously for riding without a headlamp. (RP6 368)

On the night of his arrest, Bradley was listening to music on his music player, but was able to hear Officer Eugley tell him to stop. (RP6 369, 371) He did not understand why the officer was trying to contact him, so he turned and asked: "Is there a problem?" (RP6 371) Bradley did not think he had done anything wrong, and thought it might be another mix-up like the night before, so he kept riding. (RP6 372-73, 374) Because Officer Eugley kept following him, Bradley reached into his jacket to turn down his music so he could hear the officer better. (RP6 372)

Bradley heard the police car speed up, and thought that Officer Eugley was going to run into him. (RP6 374) He was surprised and scared when the car came close to him, so he stopped and jumped off of the bicycle. (RP6 374, 375) He told Officer Eugley that he did not have probable cause to stop him, and asked why he was trying to drive into the bicycle. (RP6 375) Bradley repeatedly asked Officer Eugley why he stopped him. (RP6 377)

Bradley testified that he did not know he had committed any

traffic infractions, and would have stopped if he understood why Officer Eugley was trying to make contact with him. (RP6 410, 414, 418, 419) Bradley denied having any drugs in his possession that night, and denied that the drugs found in the bushes were his. (RP6 376-77, 418) Bradley also denied making any threatening statements to Officer Eugley. (RP6 381)

IV. ARGUMENT & AUTHORITIES

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvone, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

In this case, the State failed to present sufficient evidence to prove beyond a reasonable doubt the essential elements of

unlawful possession of a controlled substance and the essential elements of harassment.

- A. THE STATE FAILED TO PROVE THE ELEMENTS OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE BECAUSE THERE WAS INSUFFICIENT EVIDENCE LINKING BRADLEY TO THE BAG OF COCAINE FOUND IN THE BUSHES.

Under RCW 69.50.4013(1), it is unlawful to possess a controlled substance. Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the drugs. See State v. Ibarra-Raya, 145 Wn. App. 516, 524, 187 P.3d 301 (2008); State v. Portrey, 102 Wn. App. 898, 904, 10 P.3d 481 (2000). In determining dominion and control, no one factor is dispositive; the totality of the circumstances must be considered. Portrey, 102 Wn. App. at 904. Proximity alone is not enough to establish constructive possession. State v. Echeverria, 85 Wn.App. 777, 784, 934 P.2d 1214 (1997). There must be other circumstances, coupled with proximity, linking the defendant to the drugs in order to establish constructive possession. See, e.g., State v. Hagen, 55 Wn. App. 494, 781 P.2d 892 (1989); State v. Sanders, 7 Wn. App. 891, 893, 503 P.2d 467 (1972).

The State alleged that Bradley possessed the bag of cocaine

found by Officer Eugley in the bushes. (CP 124; RP6 457-58) But the circumstances in addition to proximity do not support a conclusion that Bradley placed the drugs in the bushes. First, although his fist was closed when he stepped off his bicycle, his fist was also closed when he removed it from the bushes. (RP5 287, 292-93) Officer Eugley did not see anything in his hand at any time. (RP5 287) The area where the bag was found is heavily traveled. (RP5 268) When Bradley stood up, Officer Eugley did not notice any dirt or mud on his clothing, but there was a dirt-like substance covering the bag. (RP5 293-94, 295) And finally, a search of Bradley revealed no money, lighter, paraphernalia or other instruments used to ingest cocaine. (RP5 298-99)

The only evidence that the State presented to link Bradley to the bag of cocaine was Bradley's proximity to the bushes and his on-scene denial of ownership. These facts are insufficient to prove beyond a reasonable doubt that Bradley possessed the bag of cocaine and placed it into the bushes. Bradley's unlawful possession of a controlled substance conviction should be reversed.

B. THE STATE FAILED TO PROVE THE ELEMENTS OF HARASSMENT BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT OFFICER EUGLEY HAD ANY REASONABLE FEAR THAT BRADLEY COULD OR WOULD ACTUALLY CARRY OUT HIS THREAT, AND INSUFFICIENT EVIDENCE THAT BRADLEY COULD HAVE FORESEEN THAT OFFICER EUGLEY MIGHT TAKE THE THREAT SERIOUSLY.

RCW 9A.46.020(1) provides in relevant part that 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.³

The First Amendment generally prohibits government interference with speech or expressive conduct. State v. Brown, 137 Wn. App. 587, 591, 154 P.3d 302 (2007); State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998). But the harassment statute has been found to be a constitutional limitation of speech because the prohibited statement must rise to the level of a threat to cause bodily injury to a person. Brown, 137 Wn. App. at 591. Without such threat of bodily injury, the limitation on speech would be unconstitutional. Id.

³ The crime is elevated to a class C felony if the threat involves a threat to kill. RCW 9A.46.020(2)(b).

However, the punished speech must rise to the level of a “true threat.” Knowles, 91 Wn. App. at 373. 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 an intention to inflict bodily harm upon or to take the life of [another individual].” State v. Johnston, 156 Wn.2d 355, 360-61, 127 P.3d 707 (2006) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir.1990)) (internal quotation marks omitted).

In State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003), the Court reversed a harassment conviction based on the lack of evidence that the person threatened had actually been placed in reasonable fear that the threat made would be carried out. C.G. was acting out in class, became angry, used profanity, and kicked her desk. 150 Wn.2d at 606. C.G. left the room with the vice principal, yelling obscenities as she went. 150 Wn.2d at 606. Finally, C.G. said to the vice principal, “I’ll kill you Mr. Haney, I’ll kill you.” 150 Wn.2d at 607. The vice principal testified that C.G.’s threat “caused him concern” and that, “based on what he knew about C.G., she might try to harm him or someone else in the future.” 150 Wn.2d at 607. The Court held that “the State must

prove that the victim was placed in reasonable fear that the same threat, i.e., 'the' threat, would be carried out." 150 Wn.2d at 609.

As in C.G., there is insufficient evidence in this case to convince a reasonable jury that Officer Eugley had a reasonable fear that Bradley would carry out his threat. The harassment charge arose from Bradley's statement to Officer Eugley in the police car during the drive to the jail. After Officer Eugley placed the handcuffed Bradley into the backseat of his patrol car and seated himself on the other side of the Plexiglas divider (RP5 237, 317), Bradley allegedly said: "White boy, you are dead. You are going to get a 12-gauge shotgun shoved in your mouth and your head is going to be blown off. . . . Oh, look, your face is bruised . . . just you wait and see." (RP5 241)

Officer Eugley testified that he was concerned and scared because he did not know what Bradley could do, because what Bradley said was "threatening," and because Bradley stared at Eugley with a "look on his face." (RP5 242, 243) But none of Officer Eugley's actions bear out his alleged concern after the threat. Officer Eugley did nothing in response to the threat, proceeding to deliver Bradley to the jail as planned. He did not book Bradley for harassment. RP5 315. And he did not include

that he felt fear or concern in his written report. (RP5 317, 320) Like the vice-principal in C.G., Officer Eugley only alludes to a vague concern that Bradley might someday carry out the threat if he “had an opportunity[.]” RP5 242.

Moreover, the context of Bradley’s statements do not support a conclusion that the statements were a “true threat.” Although he was verbally combative, Bradley was never physically combative or resistant. (RP5 302, 303, 318) Officer Eugley acknowledged that Bradley was upset about being stopped and arrested, and that others who he has arrested in the past have also become irate and said “all sorts of stuff.” (RP5 314)

Officer Eugley also searched Bradley before placing him into the patrol car, and found no weapons. (RP5 226, 228) Bradley was physically controlled during the ride to and booking at the jail, making it impossible for him to carry out a threat to inflict bodily harm. (RP5 317) There is simply insufficient evidence to conclude that a reasonable person would foresee that this statement, made under these circumstances, would be interpreted as a serious expression of an intention to take Officer Eugley’s life.

Like in C.G., the State failed to prove that the victim of the threat, Officer Eugley, had a reasonable fear that the threat would

be carried out, and failed to prove that Bradley's actions showed that he intended or believed the threat would be taken seriously. Accordingly, the harassment conviction must be reversed.

V. CONCLUSION

The State failed to provide sufficient evidence to prove that Bradley possessed the cocaine found in the bushes. The State also failed to provide sufficient evidence that Officer Eugley had a reasonable fear that Bradley would act on his statements, or that Bradley did or would foresee that his statements would be taken as a serious threat. Bradley's unlawful possession of a controlled substance and harassment convictions should therefore be reversed.

DATED: June 6, 2011



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CERTIFICATE OF MAILING

I certify that on 06/06/11, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Alonzo L Bradley Sr., DOC#718082, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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