

NO. 47888-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH NICKOLS,

Appellant.

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

The Honorable James W. Lawler, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support Mr. Nickols's conviction for harassment of Kari Lupo.

2. There was insufficient evidence to support Mr. Nickols's conviction for harassment of Jack Haskins.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Kari Lupo and Jack Haskins believe they were the objects of Mr. Nickols's threats, but substantial evidence does not establish Mr. Nickols directed threats to either of them. Is reversal of the harassment convictions required because there is insufficient evidence Mr. Nickols knowingly harassed Ms. Lupo or Mr. Haskins?

C. STATEMENT OF THE CASE

1. Procedural Facts

By its Third Amended Information, the Lewis County Prosecutor charged Joseph Nickols with two counts of Harassment of a Criminal Justice Participant Performing Official Duties.¹ CP 35, 36. A jury found Mr. Nickols guilty of both counts. CP 86, 87. The court sentenced Mr. Nickols to 43 months in prison, the high end of the standard range. CP 96- 97; RP Sentencing Hearing 194. This appeal follows. CP 105-17.

¹ RCW 9A.46.020(2)(b)(iv)

2. Trial Testimony

Jack Haskins is the Lewis County Jail classification and compliance officer. RP Trial 92. His duties included, among other things, monitoring inmate mail. RP Trial 92. He worked for the jail for 31 years. RP Trial 93. He knew Joseph Nickols both as a current inmate and as a person who had been incarcerated in the jail several times previously. He also knew Mr. Nickols frequently filed grievances and lawsuits against the jail. In fact, Officer Haskins was a named party in one of Mr. Nickols's lawsuits a year or two earlier. RP 110.

Officer Haskins described how inmates send mail. RP Trial 95. The inmate acquires paper and envelopes from the jail. The inmate must address an outgoing letter in a specific manner. The inmate puts the finished letter in their cell window and a corrections officer picks it up around midnight. RP Trial 94. Outgoing letters are subject to review by Officer Haskins or other officers before they are mailed. RP Trial 96. Jail mail rules are posted in seating areas and at the inmate kiosk. RP Trial 95.

On May 26, 2015, Mr. Nickols attempted to mail a letter to his girlfriend, Lori Heller. RP Trial 95; Exhibit 1.² The letter was given to

² See Supplemental Designation of Clerk's Papers

Officer Haskins for review. RP Trial 96. After reading the letter, Officer Haskins decided it contained information that might be of interest to detectives as it mentioned drugs and how to obtain them. RP Trial 100. Rather than mailing the letter to Ms. Heller, Officer Haskins gave it to Lewis County Sheriff's Detective Seiber. RP Trial 98-100.³ Exhibit 1.

Because Officer Haskins did not mail the letter to its intended recipient, jail policy required Mr. Nickols be notified. Officer Haskins directed jail support technician Kari Lupo to draft a Notice of Restricted Mail. She did so. Both Officer Haskins's name and Ms. Lupo's name appear near the bottom of the typed form: "By: K. LUPO PER OFC. HASKINS." Exhibit 3. The notice specified, "Letter has been turned over to detectives for possible criminal charges." Exhibit 3.⁴ Corrections officers deliver inmate mail, to include restriction notices, to inmates daily after 4 p.m. RP Trial 102.

On May 28, another letter written by Mr. Nickols to Ms. Heller appeared on Officer Haskins's desk. RP 103. Exhibit 2.⁵ The letter made reference to the first letter (Exhibit 1).

You will never believe what this punk ass jail did now lol I got them fucken with my mail again and there sending my letter to the DA for criminal charges fuck you you punk as Bitches hope and want to see you kids get raped and shoot in the head or hit by a car

³ Detective Seiber gave the letter to the local drug task force. RP Trial 88.

⁴ See Supplemental Designation of Clerk's Papers

⁵ See Supplemental Designation of Clerk's Papers

Officer Haskins's reaction to the letter was that Mr. Nickols wrote a note to "all of the officers who read his mail." RP Trial 105. He thought it was "out of the ordinary" and also interpreted it to specifically threaten him and his children and he feared he would carry out the threat. RP Trial 106. In the body of the letter Mr. Nickols further wrote:

lol I need them to fuck up again and send my letter to the DA now im going to shoot all who fucked with it with there own gun lol like in my last law suit I should have never let up on them when I had the gun there so dumb they gave me a gun and this time I got money for a attorney

Exhibit 2.

As a long term corrections officer, Officer Haskins had been threatened over his career an estimated 200-300 times. RP Trial 106. Although he had a history with Mr. Nickols, Officer Haskins felt this was different because of the specificity. He worried too that Mr. Nickols was scheduled to be released soon and, in the first letter, Exhibit 1, he believed Mr. Nickols wrote about having access to a handgun. RP Trial 107.

For her part, Kari Lupo did not know Mr. Nickols. RP 125. Creating orders restricting mail was part of her duties. RP Trial 114. Ms. Lupo never read either of Mr. Nickols's letters. RP 125. Instead, she read log entries written by Officer Haskins. RP Trial 116, 122-23. Officer Haskins's entries said the letters contained threats that "their children get raped and hit by a

car” and that Mr. Nickols said he would shoot people who messed with his mail using their own gun. RP Trial 123. Officer Haskins also inferred that Mr. Nickols put a hit on his girlfriend’s son and Mr. Nickols wanted his girlfriend to deal drugs for him while he was in jail. RP Trial 124-35. After she read the log entries, she felt she was a person who messed with Mr. Nickols’s mail because her name was on the Notice of Restricted Mail. She became hysterical and had to leave her desk. RP Trial 124-35.

D. ARGUMENT

THE CONVICTIONS ARE BASED ON INSUFFICIENT EVIDENCE BECAUSE THE STATE FAILED TO PROVE OFFICER HASKINS OR KARI LUPO WERE THE OBJECT OF MR. NICKOLS’S THREATS.

The state failed to prove Mr. Nickols knowingly threatened Officer Haskins or Ms. Lupo. Both convictions must be reversed and the charges dismissed with prejudice.

Due process under the Fourteenth Amendment of the United States Constitution requires the state to prove all necessary facts of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the state, a rational trier of fact could

find each essential element of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

A person is guilty of harassment of a criminal justice participant if (1) the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to another person; (2) the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out; and (3) the person threatened is a criminal justice participant who was threatened because of an action taken or a decision made during the performance of their duties. RCW 9A.46.020(1)(a)(i) and (2)(b); *see also State v. Kilburn*, 151 Wn.2d 36, 43, 54, 84 P.3d 1215 (2004) (criminal harassment statute prohibits “true threats”).

“Threat” is defined as “to communicate, directly or indirectly the intent ... [t]o cause bodily injury in the future to the person threatened or to any other person.” RCW 9A.04.110(28)(a). “Knowingly threatens” means that “the defendant must subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat to cause bodily injury to the person threatened or another person.” *State v. J.M.*, 144 Wn.2d 472, 481, 28 P.3d 720 (2001). “Under RCW 9A.46.020(1)(a)(i), the person threatened is generally the victim of the threat, i.e., the person against whom the threat to inflict bodily injury is made. *J.M.*, 144 Wn.2d at 488.

The evidence in this case is insufficient to show either Officer Haskins or Ms. Lupo was “the person threatened” and that Mr. Nickols “knowingly” directed his threats toward these two individuals.

In criminal harassment cases, words are important. They form the basis for conviction. It is therefore appropriate to scrutinize them and the context in which they occur.

Mr. Nickols directs comments in the second letter, Exhibit 2, to the “punk ass jail,” “punk as [sic] Bitches,” “all who fucked with” an unspecified letter he hopes gets sent “to the DA, as well as “punks reading this.” Exhibit 2. He does not mention Officer Haskins or Ms. Lupe. The evidence is insufficient to show Mr. Nickols, in ranting at people in the jail, knowingly included Officer Haskins or Ms. Lupe in the rant.

It appears no case has directly addressed the issue of what level of specificity is needed to prove an alleged victim of harassment is “the person threatened” under RCW 9A.46.020. In other cases, the “person threatened” was clear. *See J.M.*, 144 Wn.2d at 475 (“I’d only kill Mr. Sharper, Mr. Hashiguchi, and Mr. Boyd.”); *State v. Kilburn*, 151 Wn.2d 36, 39-40, 84 P.3d 1215 (2004) (student charged with harassing K.J. after stating “I’m going to bring a gun to school tomorrow an shoot everyone and start with you [K.J.]”); *State v. C.G.*, 150 Wn.2d, 604, 607, 80 P.3d 594 (2003) (“I’ll kill you Mr. Haney, I’ll kill you.”); *State v. Boyle*, 183 Wn. App. 1, 335 P.3d

954 (2014) (defendant told Officer Morrison “someone will kill you”); *State v. Schaler*, 145 Wn. App. 628, 633-34, 186 P.3d 1170 (2008), *reversed on other grounds*. *State v. Schaler*, 169 Wn.2d 274 (2010) (defendant told mental health evaluator he wanted to kill his two neighbors); *State v. Kiehl*, 128 Wn. App. 88, 90, 113 P.3d 528 (2005) (defendant told mental health counselor “this was all Judge Matheson’s fault” and “he was going to kill him”).

In those cases, specific people were threatened. This is not what we have here. Instead, we have threats broadly directed toward a group of people who most likely work in the Lewis County Jail. Exhibit 2. Officer Haskins and Ms. Lupo were chosen as victims for purposes of the charging documents and trial seemingly because their names were on the Notice of Restricted Mail. Exhibit 3. Ms. Lupo never even read Mr. Nickols’s second letter. She only read Officer Haskins summarized description of both letters’ partial content.

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. To withstand constitutional scrutiny, the verdict against Mr. Nickols must be supported by substantial evidence that supports a finding of guilty beyond a reasonable doubt as measured by a rational trier of fact. *State v. Green*, 94 Wn. 2d 216, 220-22, 616 P.2d 628 (1980); *State v. Jacobs*, 121 Wn. App. 669, 680-81,

89 P.3d 232 (2004), *reversed on other grounds*, *State v. Jacobs*, 154 Wn.2d 596 (2005). Officer Haskins and Ms. Lupo as “victims” amounts to speculation, which is not substantial evidence. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). To “knowingly threaten” someone, the defendant must subjectively know that the communication he imparts is a threat to cause bodily injury to the person threatened. *J.M.*, 144 Wn.2d at 481.

Officer Haskins erroneously read into Mr. Nickols’s second letter a specific and targeted threat against both his children and himself. RP Trial 106. Per Officer Haskins, “There was a statement the he couldn’t wait to see *my* kids get raped or shot or run over by a car and further on down he said he would shoot *me* with my own handgun.” RP Trial 106. A close read of the second letter, Exhibit 2, reveals no such personalization. Similarly, Ms. Lupo just “felt” that because she could be perceived as a person who “messed with” Mr. Nickols’s mail, Mr. Nickols must have been directing threats at her. RP Trial 123.

That Officer Haskins and Ms. Lupo believed Mr. Nickols included them in the people referenced in his second letter based on the content of Mr. Nickols’s letter does not support the legal conclusion that Mr. Nickols knowingly threatened Officer Haskins and Ms. Lupo. Officer Haskins’s and Ms. Lupo’s feelings or conclusions about whether they were included in the

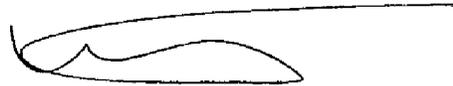
group to which Mr. Nickols directed his threats does not answer the question of whether the state proved they actually were “the persons threatened” and that Mr. Nickols “knowingly” directed threats towards them. Those are two separate questions. They should not be conflated.

The harassment convictions must be reversed and the charges dismissed with prejudice because there is insufficient evidence to prove each element of the crimes. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The prohibition against double jeopardy forbids retrial. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

E. CONCLUSION

Mr. Nickols’s convictions should be reversed and remanded to the trial court for dismissal with prejudice.

Respectfully submitted February 25, 2016.



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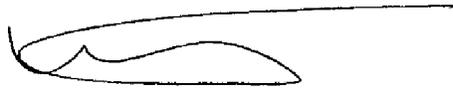
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Lewis County Prosecutor's Office, at appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Joseph Nickols/DOC#345637, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed February 25, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Joseph Nickols, Appellant

LISA E TABBUT LAW OFFICE

February 25, 2016 - 11:05 AM

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