

FILED

SEP 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 288617

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DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

AARON MALCOLM URBINA, Appellant

APPEAL FROM THE SUPERIOR COURT OF
BENTON COUNTY

THE HONORABLE CARRIE L. RUNGE

OPENING BRIEF OF APPELLANT

Marie Trombley
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A. ASSIGNMENT OF ERROR

1. The evidence was insufficient to find Mr. Urbina guilty of the crime of felony harassment.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was Mr. Urbina's right to due process under Article 1 §3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, violated where the State failed to prove that Mr. Urbina's alleged threat to kill was a "true threat" or that his conduct placed Officer Sneyd in reasonable fear that he would carry out the threat?

B. STATEMENT OF FACTS

On December 10, 2009, Mr. Urbina arrived at his family's home around 6:00 a.m. after a night of partying. He was still under the influence of cocaine and alcohol. (RP 53, 60-61). Officers Sneyd, Salter, and Bowe responded to a disturbance call at the home around 7:00 a.m. As the officers approached the house, they saw Mr. Urbina walking from the back of the residence toward a car parked in front of the house. (RP 9). They shouted to Mr. Urbina to stop. (RP 40).

Mr. Urbina continued walking, then unlocked and reached into the car. (RP 40-41). Officers Sneyd and Slater continued to yell at

him to stop and pointed their tazer guns at him. Officer Bowe drew his gun and pointed it at him. (RP 11,41). Mr. Urbina cursed at the officers. (RP 42). They pulled him from the car, handcuffed and arrested him for obstructing their investigation of the disturbance. (RP 12). It was obvious to the officers he smelled of alcohol, his speech was slurred and repetitive, and his eyes were watery and bloodshot. (RP 10,20).

As officers walked Mr. Urbina to the patrol car, he went limp. (RP 42). Mr. Urbina testified he could barely walk; his pants were almost below his knees. The officers pulled him along. (RP 62). The confrontation became more physical. (RP 13, 42). Officers placed Mr. Urbina over the hood of the patrol car three different times in an attempt to search him. (RP 14, 42). Mr. Urbina testified the officers were angry with him and slammed his face into the patrol car hood. (RP 63). Mr. Urbina then struggled to get away from them. (RP 42).

Officers testified they "took him to the ground" and sat on him "until he couldn't move anymore." (RP 43). Mr. Urbina testified the officers dropped him hard to the ground, choked him, and repeatedly banged his head on the ground. (RP 66). As officers

attempted to place him in the patrol car, Mr. Urbina's girlfriend called out, "Why are you doing this to him?" (RP 64).

Mr. Urbina testified one of the officers answered, "Do you have something to say? Are you saying something? Do you want to come out here too?" (RP 64). In response, Mr. Urbina got close to Officer Bowe's face and said, "You better watch your family." (RP 44, 64).

Officer Bowe testified he thought Mr. Urbina was going to "head butt" him so he hit him in the face. Mr. Urbina fell straight back and landed on the ground. (RP 44). Mr. Urbina testified the officer was angry with him and "used the excuse that I tried to head butt him." (RP 65). Mr. Urbina agreed that he was hit in the face, fell over backward, and landed on the cement with his head. He further stated the officer then put his knee on Mr. Urbina's neck and said, "Don't you ever threaten my family again." (RP 65). Mr. Urbina was again choked and an officer repeatedly banged his head on the ground. (RP 65-66).

Mr. Urbina was placed in the patrol car and transported to the jail. (RP 16). On the way, Officer Sneyd said Mr. Urbina swore and said, "he would come into Denny's and he would smoke any officer he sees" and "He threatened to kill me, specifically, on our way to

jail.” (RP 17). Mr. Urbina testified the officer verbally taunted him on the way to the jail saying, “You f-ing pussy. It’s Christmastime, why are you being sad? You’re supposed to be happy. I’m going to a Christmas Ball, while you’re going to jail all beat up. That’s right, you keep talking. It’s all getting written down.” (RP 68).

At the jail, Mr. Urbina complained of a headache and leg pain, stating, “I was telling them my head was hurting. I felt like my whole right side of my body was paralyzed, numb, from just being beaten and stomped.” (RP 69). The jail staff inspected his head and told Officer Sneyd to transport Mr. Urbina to the hospital. He was admitted, given a CT scan and remained under observation for 24 hours. (RP 31, 69).

Mr. Urbina was charged by amended information with felony harassment of Officer Sneyd. He was convicted in a jury trial and sentenced to 3 months, with credit for time served. (CP 62-68). This appeal follows. (CP 76).

C. ARGUMENT

The State Did Not Meet Its Burden To Establish That Mr. Urbina’s Words Constituted A True Threat Or That His Conduct Placed Officer Sneyd In Reasonable Fear That The Threat Would Be Carried Out, An Essential Element Of The Crime.

The State is required to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); United States Constitution, Fourteenth Amendment; Washington Constitution, Article 1 § 3. An essential element of a crime is one that must be proved to establish the illegality of the behavior. *State v. Johnson*, 119 Wn.2d. 143, 147, 829 P.2d 1078 (1992).

In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38,941 P.2d 1102 (1997).

To convict for the crime of felony harassment, each of the following elements must be proved beyond a reasonable doubt:

- (1) Without lawful authority,
- (2) The person *knowingly* threatens to kill the person threatened or any other person, immediately or in the future, *and*

(3) The words or conduct places the person threatened in *reasonable fear* that the threat will be carried out. RCW 9A.46.020 (1)(a)(b), (2)(b)(ii). (Emphasis added).

Mr. Urbina argues his words were not a “true threat” and Officer Sneyd was never placed in reasonable fear that he would carry out any threat.

1. Mr. Urbina’s Words Did Not Constitute A “True Threat” Because A Reasonable Person Would Not Believe His Words Were A Serious Expression To Take The Life Of Another.

“True threats” must be distinguished from threats that constitute protected speech. *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). A “true threat” is not protected speech because there is an overriding governmental interest in the protection of individuals from the fear of violence, from the disruption that fear engenders, and from the possibility the threatened violence will occur. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-88, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

To determine whether a ‘true threat’ has been made an appellate court must review the constitutionally critical facts in the record. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004).

The relevant constitutional question is whether an alleged threatening statement was made in a “context or under circumstances wherein a reasonable person would foresee that the statement would be interpreted...*as a serious expression of intention* to inflict bodily harm upon or to take the life of [another individual]. “ (Emphasis added). *State v. Williams*, 144 Wn.2d 197, 208, 26 P.3d 890 (2001).

Thus, to knowingly make a threat, that is, a “true threat”, a trier of fact must determine whether the defendant knew *subjectively* that the statement would be interpreted by whoever received it, as a serious expression of intent to harm. *State v. J.M.*, 101 Wn.App. 716, 730, 6 P.3d 607, (2000). An idle threat, one that is made jokingly or is mere puffery does not constitute a “true threat”. *Kilburn*, 151 Wn.2d at 46.

In *State v. Kilburn*, an eighth grade boy, talking with a female student, said he was going to bring a gun to school the next day and shoot everyone, beginning with her. *Kilburn*, 151 Wn.2d at 52. Though he laughed after he said it, she was unsure if he was serious or merely kidding with her. The trial court found the girl’s testimony credible and that she reasonably feared Kilburn would carry out the threat. *Kilburn* at 39.

The appellate court conducted an independent review of the context and facts. It found that a reasonable person in Kilburn's position would foresee that his comments *would not* be interpreted seriously. The court determined the evidence was insufficient to support his conviction.

By contrast, in a case, which focused mainly on the constitutionality of the harassment statute, the court, after review of the context and facts, held a "true threat" had been made. *Williams*, 144 Wn.2d at 212. There, Williams, an employee at a company, was fired. Williams wanted his final paycheck that same day. He was told he could pick it up at the next scheduled pay day, some ten days later. Williams returned to the store before the scheduled payday and again demanded his paycheck. This time he had a friend with him who mouthed the words, "He has a gun". The manager gave him the paycheck. As Williams was leaving, he turned to the manager and said, "Don't make me strap your ass." *Williams*, 144 Wn.2d at 202.

Ultimately, the court reversed his conviction because it found the statute unconstitutionally vague on some points. However, based on the context and circumstances of the communication, it found a rational trier of fact could possibly conclude Williams'

statement to cause harm to the manager in the future was sufficient to send the case to the jury. *Williams*, 144 Wn.2d at 212.

As in *Kilburn* and *Williams*, the appellate court here must review the constitutionally critical facts in the record. Mr. Urbina argues, in light of the entire context and circumstances of the communication, his words were not a true threat.

There was ample evidence Mr. Urbina was highly intoxicated at the time of his encounter with officers. Further, there is evidence Mr. Urbina suffered head trauma as a result of the physicality of the officers. The literal meaning of words is not necessarily the intended communication. The true meaning of words may be lost if they are lifted out of context.” *State v. Scherck*, 9 Wn.App. 792, 794, 514 P.2d 1393 (1973). In context, Mr. Urbina’s words were the rants of a drunk and humiliated young man who had been arrested, beaten, and verbally taunted by a police officer.

Mr. Urbina was clearly in the subordinate position during the encounter with Officer Sneyd. He was frightened, angry, and without means to defend himself from the physicality of the officers. As he stated, “ I was sad, hurt and was just gone out of my mind” (RP 64) and “I didn’t say I would find you at Denny’s... I said, see what you just did to me right there after just beating me up, that’s

why fools like you get smoked, because you hurt people like me...I didn't say, I'll find you. I don't even know this man—none of them.” (RP 67).

Even if Mr. Urbina uttered the words, “I will kill you”, a reasonable person in Mr. Urbina's position, in that context, would not foresee that Officer Sneyd would take his threat as a serious threat to do future harm.

2. The State Failed To Prove Officer Sneyd Was In Reasonable Fear That The Threat Would Be Carried Out, A Required Element Of Felony Harassment.

The criminal harassment statute requires the person threatened to subjectively feel fear and that fear must be reasonable. *State v. E.J.Y.*, 113 Wn.App. 940, 953, 55 P.3d 673 (2002). Even assuming the evidence established Officer Sneyd's subjective fear, the issue is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt, using an objective standard, that his fear was reasonable. *See State v. Green*, 94 Wn.2d at 221.

Reasonable fear is more than mere concern. In *C.G.*, a juvenile threatened to kill the vice-principal at her school, saying, “I'll kill you Mr. Haney, I'll kill you.” *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594

(2003). The court there held there must be proof the victim was placed in reasonable fear the student would kill him. Because the vice-principal testified that while the threats caused him concern, and he thought she might try to harm someone in the future, he did not ever fear for his life. The conviction required reversal. *C.G.*, 150 Wn.2d at 610.

By contrast, the court in *State v. E.J.Y.*, held that the hearers of E.J.Y.'s threats were placed in subjective and reasonable fear. *E.J.Y.* 113 Wn.App. at 953. The defendant, a special education student with learning and behavioral disabilities, became upset at school one day. He stated he should go get his gun and "do like Columbine" and chanted "Columbine, Columbine". Both the vice-principal and the attendance specialist who heard the statements testified his words frightened them. *E.J.Y.* 113 Wn.App. at 944-45. The trial court concluded "when those words were uttered they had their intended effect, that was to create a reasonable fear that these threats could be carried out." *E.J.Y.* 113 Wn.App. at 954.

The reasonable fear element under the statute requires triers of fact to consider the speaker's conduct in context and sift out idle threats from those that warrant criminal punishment. *State v. Alvarez*, 74 Wn. App. 250, 261, 872 P.2d 1123, (1994) *review*

granted, 125 Wn.2d 1001, 886 P.2d 1133, *aff'd*. 128 Wn.2d 1, 904 P.2d 754 (1995). Here, the officers were angry with Mr. Urbina and had little patience for his belligerent words and conduct. They overpowered Mr. Urbina at every stage of the contact and arrest. With the exception of the disputed “head butt”, all of Mr. Urbina’s actions were an attempt to get away from the officers, not attack them.

Most telling that Mr. Urbina’s words clearly did not have the effect of creating fear, was that Officer Sneyd made fun of and called Mr. Urbina names as he transported him to the jail, and said, “Keep talking, it’s all getting written down.” (RP 68).

There is insufficient evidence to establish Officer Sneyd was either subjectively afraid or objectively placed in reasonable fear that Mr. Urbina would carry out any threats. Insufficiency of the evidence requires the court to reverse the conviction and dismiss the charge. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

D. CONCLUSION

Based on the foregoing facts and authorities, Mr. Urbina respectfully requests this court to reverse his conviction and dismiss all charges.

Respectfully submitted on this 8th day of September, 2010.

A handwritten signature in cursive script, reading "Marie Trombley", is written over a horizontal line.

Marie Trombley, WSBA # 41410
Attorney for Appellant Urbina

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant Urbina, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on September 8, 2010, to Aaron M. Urbina, 1730 W. Nixon St. Pasco, WA 99301, and Andrew K. Miller, Benton County Prosecutors Office, 7122 W. Okanogan Pl. Bldg. A, Kennewick, WA 99336

A handwritten signature in cursive script, reading "Marie J. Trombley", is written over a horizontal line.

Marie J. Trombley