

FILED

AUG 13 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 302431

Consolidated with 302423

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

URIEL PONCE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY
The Honorable Carrie L. Runge

APPELLANT'S OPENING BRIEF

TANESHA LATRELLE CANZATER
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A. ASSIGNMENTS OF ERROR

1. The trial court failed to enter written findings of fact and conclusions of law as required by Court Rule (CrR) 3.5(c).
2. The State did not prove each element of felony harassment beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court's failure to enter written findings following the CrR 3.5 hearing requires remand?
2. Whether the State's evidence was sufficient for a rational trier of fact to have found Mr. Ponce guilty of felony harassment beyond a reasonable doubt?

C. STATEMENT OF THE CASE

Antonia Ponce (Ms. Ponce) was fired from Taco Bell in Pasco after 16 years of service. Ms. Ponce contested the firing. She filed an Equal Employment Opportunity complaint against the company that described how the manager pushed her off a chair and how he made derogatory remarks about her appearance and her age. 7/7/11 RP 163; 7/8/11 RP 191-92.

Sometime after Ms. Ponce was fired, the manager received an anonymous telephone call. 7/7/11 RP 105. When the manager identified himself, the man on the other line called the manager a "bitch" and

ordered him to come outside. The man told the manager that he was going to kill him. 7/7/11 RP 106. Initially, the manager believed the caller sounded like one of Ms. Ponce's sons. 7/7/11 RP 108. Two of her sons, Jose Ponce (Jose) and Uriel Ponce (Mr. Ponce) had worked at the Taco Bell before. 7/7/11 RP 163. The manager later testified that he could not tell for certain whether the caller was a "Ponce brother at all." 7/7/11 RP 110.

The manager listened for a minute then hung up the telephone. 7/7/11 RP 108. He was not particularly concerned until after he spoke with a co-worker who encouraged him to make a record of the incident in light of Ms. Ponce's pending complaint. 7/7/11 RP 106-107.

The manager dialed star 69 for the return number and telephoned police. 7/7/11 RP 108. The responding officer asked dispatch to search the number. The number came back to Ms. Ponce's address. 7/7/11 RP 129. At the time, Ms. Ponce lived with her husband and their sons Jose, Mr. Ponce, and Tobias. Tobias's wife and children also lived at the house. 7/7/11 RP 162.

The officer drove to the Ponce residence and spoke with Jose. When the officer realized that Mr. Ponce was not there, he dialed the cell phone number that he received from the manager. A man, who identified

himself as Michael Jones, answered. 7/7/11 RP 130-131. Michael Jones told the officer that he had loaned his telephone to a homeless person. The officer told the court that as soon as he asked if they could meet, the man hung up. 7/7/11 RP 132.

The next morning, the officer served a search warrant at the Ponce residence. Mr. Ponce was there. The officer placed him under arrest and claimed that Mr. Ponce, without provocation, declared that he had lost his cell phone, but that he had a new one. 7/7/11 RP 133. The officer found a cell phone. But it was disconnected and was not the same cell phone that was used to call Taco Bell. 7/7/11 RP 134.

The officer transported Mr. Ponce to jail. There, the officer rendered Miranda warnings and explained why Mr. Ponce had been arrested. 7/7/11 RP 134. According to the officer, Mr. Ponce waived Miranda and agreed to speak with him about the case. 7/7/11 RP 135. The officer claimed that Mr. Ponce was confused as to why he was under arrest when police did not find the cell phone or any other evidence to connect him with the telephone call to Taco Bell. 7/7/11 RP 135. He further claimed that Mr. Ponce told him a man named Michael Jones had been using his cell phone; but he had no idea who Michael Jones was, or how he had known Michael Jones. 7/7/11 RP 136. The State charged Mr.

Ponce with felony harassment and with intimidating a witness. CP 147; CP 135-136.

Police released Mr. Ponce from jail. When he returned home, Jose claimed that Mr. Ponce and Mr. Ponce's friend, a girl named Kelsey, presented him with a letter. According to Jose, Mr. Ponce told him to sign a letter in which he admitted that Jose called Taco Bell and threatened the manager. 7/8/11 RP 169; 7/8/11 RP 214; 7/8/11 RP 221. Jose signed the letter. Then immediately telephoned Ms. Ponce, who was at work. 7/8/11 RP 215; 7/7/11 RP 172.

Ms. Ponce left work early and returned home. 7/7/11 RP 172. When she arrived there she confronted Mr. Ponce about the letter and asked why the letter was signed in Jose's handwriting. According to Ms. Ponce, Mr. Ponce told her that if Jose confessed that he called Taco Bell, he would get less time because he was a minor. 7/7/11 RP 173.

That day, an investigator who was hired by Mr. Ponce's attorney, stopped Jose on the street and asked if he had signed the letter freely and voluntarily. 7/8/11 RP 229. Jose said yes. 7/8/11 RP 230. About a month later, at the prosecutor's office Jose recanted his confession and told police that Mr. Ponce convinced him to sign the letter. 2/8/11 RP

221; 2/8/11 RP 217. The State charged Mr. Ponce with witness tampering. CP 143-144.

The court appointed two attorneys: one to handle Mr. Ponce's felony harassment case and another to handle the witness tampering case. CP 144; CP 141. The court consolidated the cases and tried them together. CP 136; CP 140; 6/14/11 RP 2.

During pre-trial, Mr. Ponce moved the court to suppress various statements he allegedly made to police. The officer claimed that he rendered Miranda warnings at the jail and that Mr. Ponce agreed to waive those rights. 6/14/11 RP 8-9. But Mr. Ponce testified that while in jail, the officer questioned him without advising him of Miranda warnings.

The trial court found Mr. Ponce had been apprised of his rights beforehand. The trial court further found he understood and waived those rights, and voluntarily and knowingly answered the officer's questions. The trial court concluded that all Mr. Ponce's statements to police were admissible. 6/14/11 RP 16-17. However, the trial court did not enter written findings to that regard.

At the end of the State's case, one of Mr. Ponce's attorneys moved the court to dismiss the witness intimidation charge for lack of evidence. She argued that the State had to prove at some point during the telephone

call with the manager Mr. Ponce used a threat to influence the manager's testimony or to induce the manager to absent himself from proceedings. 7/8/11 RP 263. The State argued the jury could infer what if any effect the telephone call had on the manager's testimony or participation. 7/8/11 RP 264. The court denied the motion and concluded that although somewhat "skimpy", the evidence was sufficient enough for the State to make an argument to the jury. 7/8/11 RP 266.

Mr. Ponce's other attorney moved the court to dismiss the witness tampering charge for lack of evidence. She argued that the State had not proven the elements of the crime; specifically that Jose was witness or a person who was about to be called as witness in the case when he signed the letter. 7/8/11 RP 266. The State argued that Jose was listed as a witness in the felony harassment case to identify Mr. Ponce's cell phone number. 7/8/11 RP 267. From that, the court found that the evidence was sufficient enough for the witness tampering charge to go to the jury and denied the motion.

The jury found Mr. Ponce guilty of felony harassment and of witness tampering, but not guilty of intimidating a witness. CP 35; CP 39; CP 40; 7/11/11 RP 316. The court sentenced Mr. Ponce to 27 months on both convictions and ordered the sentences to run concurrently. The court

imposed a variety of fees and issued restraining orders on behalf of the manager and Jose. 9/16/11 RP 327-330; CP 14-30; CP 17-33. Mr. Ponce appealed both convictions. CP 13; CP 15-16. Below, he challenges the felony harassment conviction. CP 15-16.

D. ARGUMENT

1. BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS AFTER THE SUPPRESSION HEARING, REMAND IS THE APPROPRIATE REMEDY.

CrR 3.5 governs generally the admissibility of “a statement of the accused.” CrR 3.5(a); State v. Williams, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). A trial court is required to enter written findings and conclusions following a CrR 3.5 hearing. CrR 3.5(c). In fact, after a CrR 3.5 hearing, the trial court must set forth in “writing (1) the undisputed facts; (2) the disputed facts; (3) conclusions of law as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.” CrR 3.5(c).

The primary purpose in requiring written findings and conclusions is to enable an appellate court to review the questions raised on appeal. Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn.App. 709, 717, 558 P.2d 821 (1977). The appellate court should not have to comb through oral rulings to determine if appropriate findings were made,

nor should an appellant be forced to interpret oral rulings. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

Failure to comply with CrR 3.5's writing requirement is an error, and the error may be harmless if the trial court's oral findings are sufficient to allow appellate review. State v. Grogan, 147 Wn.App. 511, 516, 195 P.3d 1017 (2008); State v. Miller, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998), *review denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999). However, because the entry of written findings is mandatory, remand to the trial court may be the appropriate remedy. State v. Head, 136 Wn.2d at 623. Mr. Ponce reserves the right to offer further argument depending on the content of any written findings that may be subsequently entered in this case.

2. NO RATIONAL TRIER OF FACT COULD HAVE FOUND MR. PONCE GUILTY OF FELONY HARRASSMENT BEYOND A REASONABLE DOUBT GIVEN THE STATE'S EVIDENCE.

When reviewing a challenge to the sufficiency of the evidence, the test is whether, "after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the

defendant. State v. Partin, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977), *abrogated on other grounds by* State v. Lyons, — Wn.2d —, 275 P.3d 314, 319–20 (2012). “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) (*en banc*). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (*citing* State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

In In re Winship, the U.S. Supreme Court held that the Due Process clause of the Fourteenth Amendment “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” 78 Wash. L. Rev. 557 *citing*, U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 361-64, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (*emphasis added*). The Court cited two key considerations in upholding the requirement of proof beyond a reasonable doubt in criminal proceedings. First, the interests of the accused are of “immense importance” because conviction may result in loss of liberty and social stigma. 78 Wash. L. Rev. 557 *citing*, Winship, 397 U.S. at 363. A high standard of proof reduces the risk of convictions

based on factual error. 78 Wash. L. Rev. at 560 citing, Winship, 397 U.S. at 364. Second, “use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” 78 Wash. L. Rev. at 560 citing, Winship, 397 U.S. at 364. Without this respect and confidence, the “moral force of the criminal law” would be diluted by doubt. 78 Wash. L. Rev. at 560 citing, Winship, 397 U.S. at 364. Following Winship, our Courts require the State to prove every element of the crime charged beyond a reasonable doubt. State v. Teal, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

Here, in order to convict on felony harassment, the State had to prove beyond a reasonable doubt that Mr. Ponce knowingly and without lawful authority threatened to kill the manager immediately or in the future, and by words or conduct placed the manager in reasonable fear that the threat would be carried out. RCW 9A.46.020(1)(a)(i) and (2)(b); CP 147.

The State did not elicit any direct evidence to prove that the manager believed Mr. Ponce threatened him or that the threat would even be carried out. The manager testified that he could not say for certain whether the caller on the other line was, in fact, Mr. Ponce. The reason being, the manager never met Mr. Ponce and never spoke to him. 7/7/11

RP 110-111. The manager further testified that he was not concerned about the telephone call and did not think it was enough to alert police. 7/7/11 RP 106. He only telephoned police at the behest of a co-worker, who urged him to make a record of the incident in light of Ms. Ponce's lawsuit. 7/7/11 RP 106.

Considering the manager's testimony, in the light most favorable to the State, no rational trier of fact could have found Mr. Ponce guilty of felony harassment. Where no rational trier of fact could have found all elements of the crime were proven beyond a reasonable doubt, the reviewing court must reverse the conviction. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the only appropriate remedy." Id.

E. CONCLUSION

For the reasons set forth above, Mr. Ponce respectfully asks this Court to remand for entry of findings in accordance with CrR 3.5 and to reverse the trial court's felony harassment conviction.

Respectfully submitted this 9th day of August, 2012.



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