

30397-7-III
COURT OF APPEALS
DIVISION III

FILED
May 25, 2012
Court of Appeals
Division III
State of Washington



OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY J. HERNANDEZ, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The information failed to allege an essential non-statutory element of felony harassment. (CP 2)

2. The court erred in giving jury instruction No. 9:

To convict the defendant of the crime of Felony Harassment of Another – Threat to Kill in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

Number (1) That on or about September the 18th of 2009, the defendant knowingly threatened to kill Steven Perez immediately or in the future;

Number (2) That the words or conduct of the defendant placed Steven Perez in reasonable fear that the threat to kill would be carried out;

Number (3) That the defendant acted without lawful authority; and

Number (4) That the threat was made or received in the State of Washington.

...

(RP 682-83)

3. The court erred in imposing the firearm sentence enhancement. (CP 184)

B. ISSUES

1. Under the First and Fourteenth Amendments, is the existence of a “true threat” an element of the crime of felony harassment that must be alleged in the information and included in the to-convict jury instruction?

2. When a police officer is convicted of a felony and his job-related possession of a firearm is not involved in the commission of the offense, is the evidence sufficient to support a firearm sentence enhancement?

C. STATEMENT OF THE CASE

When he was 21 years old, Anthony Hernandez got a job as a jailer/dispatcher with the Yakima Nation Police. (RP 475-76; CP 183) After a year-and-a-half he was hired as a police officer with the tribal police department. (RP 476) In March 2005, he attended the Indian Police Academy at the Federal Law Enforcement Training Center in New Mexico. (RP 480)

Two months after he was hired, and before attending the police academy, he married Miranda Bounds. (RP 476) He and Miranda had known each other since Anthony was in high school, and they began living together in 2001. (RP 470, 472)

Robert Root was a fellow tribal police officer. (RP 371) He and Anthony were often both on patrol during the night shift. (RP 378) Miranda would often call Anthony and ask him to check on their house because she had heard dogs barking, cars driving by, or other sounds that

made her uncomfortable. (RP 242, 379) If he was busy, he would ask Officer Root to drive by and shine a spotlight on the house. (RP 378-79)

In 2007, Anthony and Miranda were attending a high school soccer game when a baby fell from the bleachers to a concrete floor below. (RP 486) Anthony took charge of the situation and asked a friend to bring the infant to him. (RP 486-87) When he was handed the child he checked for vitals and found the baby had no heart beat and was not breathing. (RP 487) He told his wife to call 911 and began administering CPR. (RP 487) He continued CPR until the ambulance arrived and ultimately the child lived. (RP 488)

But the experience was very traumatic for Miranda so she sought psychological counseling. (RP 488) This eventually led to marriage counseling for both of them. (RP 489)

In May 2008, Miranda telephoned her husband while he was at work. (RP 498) When he answered he heard her screaming and crying but he couldn't understand what she was saying. (RP 499) Finally when he asked her what was wrong she told him she just wanted to die, he heard glass breaking, and she hung up. (RP 500) Anthony had just been dispatched to a crime scene, so he called Toppenish City Police, explained the situation, and asked them to check on his wife. (RP 500-501)

Minutes later the Toppenish dispatcher called to tell him that officers at the house could hear his wife crying, and could see guns lying on the floor, but Mrs. Hernandez would not come to the door. (RP 502) Anthony authorized them to kick in the door, and later received a call from a Yakima deputy sheriff indicating Miranda had been taken to the hospital. (RP 503)

When she returned home from the hospital Miranda expressed anger at Anthony because she felt he cared about his job more than he cared about her. (RP 505-07) Thereafter the marriage deteriorated and in July 2009, Anthony moved home to live with his parents. (RP 508, 515-16)

After the separation, Anthony continued to come to his home every morning to feed his dog before going to work. (RP 519) He had a key to the front door, and would let himself in, get the dog food from the pantry and go out back to feed his dog. (RP 520-21) Sometimes he would talk briefly with Miranda and occasionally use the bathroom off the master bedroom. (RP 521-22)

On the evening of September 17, 2009, Miranda called Anthony and told him he needed to pick up some bills at the house; he said he would do that in the morning. (RP 523) The next morning, after feeding

his dog, Anthony could not find the mail so he knocked on the bedroom door and said “It’s Anthony, I’m here to get my mail.” (RP 530-31)

Miranda told him to meet her in the kitchen, but as he was walking toward the kitchen he thought he heard her say something in an excited voice. (RP 531) He went back towards the bedroom door and asked her if she was all right and she said “no.” (RP 531)

Believing Miranda was in trouble, Anthony drew his pistol, told Miranda he was going to kick the door in, and when she did not respond, he did so. (RP 531-32) He checked the room for possible threats, then entered the bathroom, where he found a young man standing in the shower. (RP 532-35)

Anthony raised his gun, told the young man to show his hands, then ordered him to the floor, handcuffed him and holstered his weapon. (RP 68, 535-36) At that moment Miranda came into the bathroom and Anthony saw blood on her face. (RP 536) He got a wet washcloth, took her back to the bedroom, and when he saw a gash on her face he became angry and told her “I’m gonna fucking kill him.” (RP 537) But, Miranda told him he had injured her when he kicked in the door. (RP 537)

Anthony returned to the bathroom, asked the young man who he was, checked his identification, removed the handcuffs and ordered him to

leave the house. (RP 539) The young man was Steven Perez. (RP 47, 63-77, 540)

While Anthony was taking Miranda to the hospital, Mr. Perez got a ride to the home of Zillah Police Sergeant Tim Quantrell. (RP 81) Mr. Perez is the stepson of Zillah Police Chief Dave Simmons, and considered Sergeant Quantrell a family friend. (RP 81, 175) After telling Sergeant Quantrell what had happened Mr. Perez called his stepfather. (RP 82-83, 179) Chief Simons took his stepson to the Toppenish Police Department to report the incident. (RP 83, 188)

The following week, the State charged Anthony with first degree kidnapping and felony harassment of Steven Perez and reckless endangerment of Miranda. (CP 1-2) The felony harassment charge stated:

On or about September 18, 2009, in the State of Washington, without lawful authority, you knowingly threatened to cause bodily injury immediately or in the future to Steven J. Perez and the threat to cause bodily injury consisted of a threat to kill Steven J. Perez or another person, and did by words or conduct place the person threatened in reasonable fear that the threat would be carried out.

Furthermore, when you committed the crime, you (or an accomplice) were armed with a firearm, and your penalty will be increased. (RCW 9.94A.533)

(CP 2)

Mr. Perez told a jury that he had met Miranda Hernandez in a bar on the evening of September 17, and she had invited him to her

home. (RP 51, 58) They had watched part of a movie and had sex until they fell asleep around six o'clock in the morning. (RP 62-63) He was awaked by the sound of knocking. (RP 63) Miranda told him to leave, so he went to hide in the bathroom. (RP 64-65, 223) Moments later, Mr. Hernandez appeared in the bathroom, pointed a pistol at him, ordered him to the floor and handcuffed him. (RP 68)

Mr. Perez testified that after handcuffing him Mr. Hernandez holstered his weapon and went back to the bedroom and started talking with Mrs. Hernandez. (RP 68) He told the jury that he overheard Mr. Hernandez threatening to kill him, and that when he returned to the bathroom he said "he could kill me and probably bury me at Mount Adams and get away with it." (RP 73)

Mrs. Hernandez testified that Mr. Hernandez told her "I'm gonna kill him" and she heard him repeatedly threaten to kill Mr. Perez. (RP 229)

The court instructed the jury on the statutory elements of felony harassment:

Instruction Number "9". To convict the defendant of the crime of Felony Harassment of Another – Threat to Kill in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

Number (1) That on or about September the 18th of 2009, the defendant knowingly threatened to kill Steven Perez immediately or in the future;

Number (2) That the words or conduct of the defendant placed Steven Perez in reasonable fear that the threat to kill would be carried out;

Number (3) That the defendant acted without lawful authority; and

Number (4) That the threat was made or received in the State of Washington.

(RP 682-83)

The court instructed the jury on the definition of the term “threat:”

Threat means to communicate directly or indirectly the intent to cause bodily injury in the future to the person threatened or to any other person. To be a threat the 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, as a serious expression of intention to carry out the threat.

(RP 684)

Defense counsel proposed several alternative jury instructions defining the term “threat” to expressly exclude “spontaneous” or “self-expressive” speech. (CP 120-25; RP 670) The court declined to give any of the proposed alternatives. (RP 671-72)

The court instructed the jury that as to the firearm enhancement:

For the purpose of Special Verdict Forms I and II the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I and in Count II. A firearm is a weapon or device from which a proj, projectile may be fired by an explosive such as gunpowder.

(RP 689-90)

During deliberations, the jury sent an inquiry asking the court to define “armed with a firearm.” (CP 156) The court responded, “please read the instructions.” (CP 156)

The jury acquitted Mr. Hernandez of kidnapping and reckless endangerment, but found him guilty of felony harassment and decided that he was armed with a firearm at the time he committed the offense. (CP 157-61)

D. ARGUMENT

1. FAILURE TO INCLUDE THE “TRUE THREAT” ELEMENT OF FELONY HARRASSMENT IN THE INFORMATION AND “TO CONVICT” INSTRUCTION VIOLATED DUE PROCESS.

All facts essential to punishment, including non-statutory elements, must be pleaded in the charging document and proved beyond reasonable doubt. U.S. Const. Amend XIV; Const. Art I, § 3; *Henderson v. Morgan*, 426 U.S. 637 (1976); *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004).

Notice of the nature of the charge is “the first and most universally recognized requirement of due process.” 426 U.S. at 645. The defendant must be made “aware of the acts and the requisite state of mind in which

they must be performed to constitute a crime.” *State v. Osborne*, 102 Wn.2d 87, 93, 684 P.2d 683 (1984).

Likewise, the “to convict” instruction must contain all the elements essential to the conviction. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The court “may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

The question whether the existence of a “true threat” is an element of the crime of felony harassment that must be alleged in the information and included in the to-convict jury instruction is currently before the Washington State Supreme Court. *State v. Allen*, 161 Wn. App. 727, 255 P.3d 784, *review granted* 172 Wn.2d 1014, 262 P.3d 63 (2011).

“A statute that criminalizes pure speech must be interpreted with the commands of the First Amendment clearly in mind.” *State v. Kilburn*, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004). To “avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only ‘true threats.’” 151 Wn. 2d at 43.

Federal courts have held that the existence of a true threat is an essential element of an offense criminalizing threatening speech. *U.S. v. Bagdasarian*, 652 F.3d 1113, 1118 (C.A.9 2011) (construing

18 U.S.C. § 879(a)(3)); *U.S. v. Fuller*, 387 F.3d 643, 647 (C.A.7 2004)(construing 18 U.S.C. § 115)

2. EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FIREARM ENHANCEMENT.

A person is “armed” if the firearm is “easily accessible and readily available for use, either for offensive or defensive purposes.” *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). But, additionally, there must be a connection or nexus between the defendant, the crime, and the weapon. *State v. Eckenrode*, 159 Wn.2d 488, 490-91, 150 P.3d 1116 (2007). To establish such a nexus, there must be evidence that the accused possessed the firearm with an intent and willingness to use it in the commission of the offense. *State v. Brown*, 162 Wn.2d 422, 432, 173 P.3d 245 (2007).

The mere “[s]howing that a weapon accessible during a crime does not necessarily show a nexus between the crime and the weapon.” *Id.* When reviewing the nexus requirement, we examine “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *State v. Gurske*, 155 Wn.2d 134, 142, 118 P.3d 333 (2005) (quoting *State v. Schelin*, 147 Wn.2d 562, 570, 55 P.3d 632 (2002) (plurality)).

The circumstances in the present case are utterly inconsistent with application of the rationale that supports the weapons enhancement statute:

The theory behind the deadly weapon enhancement is that a crime is potentially more dangerous to the victim, bystanders or the police if the defendant is armed while he is committing the crime because someone may be killed or injured. Thus, the crime is more serious than it would have been without the weapon. Where no officers, victims or bystanders are present, the potential danger is also absent, and the rationale for greater punishment based on greater danger to others does not apply. The underlying rationale can apply only where there is a possibility the defendant would use the weapon.

State v. Johnson, 94 Wn. App. 882, 896, 974 P.2d 855 (1999).

When the accused possesses a weapon for reasons unrelated to the commission of the weapon, the facts may not justify a weapon enhancement. *State v. Easterlin*, 159 Wn.2d 203, 208-209, 149 P.3d 366 (2006).

For example, if a defendant is in possession of a ceremonial weapon, such as a Sikh's kirpan that he is required to carry by religious commandment, or of a prop, or of a kitchen knife in a picnic basket, or is a farmer who carries a .22 caliber rifle in a gun rack, or has some object that merely could be used as a weapon, it may be appropriate to allow him to argue to the trier of fact that he is not "armed" as meant by Washington law and to allow the trier of fact to make that determination.

159 Wash.2d at 209, n.3. Here, the evidence established that Mr. Hernandez was armed because he was a tribal police officer, in uniform,

and on duty. The legislature cannot have contemplated that protection of potential victims, bystanders and police officers would be furthered by imposing greater punishment on police officers who are convicted of felonies because their job requires them to carry a weapon.

The jury acquitted Mr. Hernandez of kidnapping and reckless endangerment because it recognized that he was acting in accordance with his training as a police officer in dealing with what he believed to be a potentially dangerous scenario. The jury probably found Mr. Hernandez guilty of felony harassment in part because it concluded Mr. Perez was indeed terrified by the entire situation, and any statement that he was going to kill someone because his wife had been either injured or unfaithful was not within the scope of Mr. Hernandez's employment as an officer. Thus, the jury recognized that when Mr. Hernandez pointed his weapon at Mr. Perez, ordered him to the ground and handcuffed him, he was not guilty of kidnapping because he was acting as a police officer.

The deadly weapon issue was more difficult for the jury because, while Mr. Hernandez was undoubtedly armed with a pistol at the time he threatened to kill Mr. Perez, there was no evidence he intended to use the weapon to facilitate the threat. It is undisputed that he holstered his weapon as soon as he had placed Mr. Perez in handcuffs and never drew it again. So the jury asked the court to further define the term "armed with a

deadly weapon” in hopes of receiving some guidance as to how this dilemma should be resolved. Had the jury been aware that, as a matter of law, there must be a nexus between the weapon and the crime, it would not have found that Mr. Hernandez was armed with a firearm.

There was no evidence that Mr. Hernandez was armed with a firearm, as that concept is understood in our state law. The sentence enhancement predicated on Mr. Hernandez’s possession of his duty weapon should be vacated.

E. CONCLUSION

The harassment conviction should be reversed and dismissed. Alternatively, the sentence enhancement should be vacated.

Dated this 25th day of May, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30397-7-III
)	
vs.)	CERTIFICATE
)	OF MAILING
ANTHONY J. HERNANDEZ, JR.,)	
)	
Appellant.)	

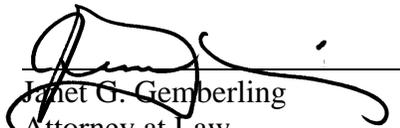
I certify under penalty of perjury under the laws of the State of Washington that on May 25, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on May 25, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on May 25, 2012.


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