

FILED
AUGUST 28, 2012
Court of Appeals
Division III
State of Washington

NO. 30653-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

RUDY RAY CORDOVA

Appellant.

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

The Honorable Maryann C. Moreno, Judge

REPLY BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT IN REPLY

In addition to the arguments and authorities set forth in the appellant's brief, Appellant adds the following. Appellant's brief correctly states that the State must prove that the victim of alleged felony harassment had an actual and objectively reasonable fear that the threat to kill would be carried out. In addition, the erroneous admission of ER 404(b) character evidence was not harmless.

B. ARGUMENT

1. THE STATE FAILED TO PROVE THAT OFFICER MCMURTREY HAD AN ACTUAL AND "REASONABLE" FEAR THAT THE DEATH THREAT WOULD BE CARRIED OUT.

RCW 9A.46.020 provides that a person is guilty of felony harassment when the person knowingly threatens to kill a person *and* "the person by words or conduct places the person threatened in reasonable fear that the threat would be carried out." Washington case law interpreting RCW 9A.46.020 clearly requires the State to prove that the alleged victim was placed in actual reasonable fear that the threat would be carried out. See, e.g., State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003); State v. E.J.Y., 113 Wn. App. 940, 952-53, 55 P.3d 673 (2002). In this

case, Officer McMurtrey did not testify that he feared the death threat would be carried out. Instead, he only testified that he was “concerned” and “aghast.” 2RP 238-39. The State failed to prove that Officer McMurtrey was placed in actual and reasonable fear that the threat to kill would be carried out. See App. Br. At 5-7.

In the Respondent's Brief, the State has asserted that the standard for the reasonable threat is purely objective with no subjective component. Resp. Br. at 3. In support of this claim, the State cites two cases that have nothing to do with the standard of proof for the victim's reasonable fear. The two cases cited by the State, State v. Ballew, 167 Wn. App. 359, 272 P.3d 925 (2012) and State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004), both discuss the test for a “true threat” in First Amendment analysis, a completely different test for a completely different issue. Kilburn holds:

“An alleged threat to kill under RCW 9A.46.020 must be a *‘true threat’ in the First Amendment sense*. Neither the First Amendment nor the statute requires that the State prove that *the defendant* actually intended to carry out his or her threat in order to convict under RCW 9A.46.020.”

(italics added), 151 Wn.2d at 54. Ballew likewise holds that: “Washington uses an objective true threat test.” 167 Wn. App. at

366. Neither case bears on the standard of proof for the victim's "reasonable fear." The test for a "true threat" is whether a reasonable person in the *defendant's* position would foresee that the victim would take the threat seriously. See Kilburn, 151 Wn.2d at 48. However, the test for felony harassment is whether *the victim* was placed in "reasonable fear." RCW 9A.46.020(1)(b). The State is attempting to equate "reasonable fear" with "true threat" when these are completely different tests for completely different purposes. See Resp. Br. at 5.

While it is true that the test for a "true threat" is objective, the test for "reasonable fear" is both subjective and objective. See State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003); State v. Cross, 156 Wn. App. 568, 582, 234 P.3d 288 (2010); State v. E.J.Y., 113 Wn. App. 940, 952-53, 55 P.3d 673 (2002); State v. J.M., 101 Wn. App. 716, 721, 6 P.3d 607 (2000), aff'd, 144 Wn.2d 472 (2001); State v. Alvarez, 74 Wn. App. 250, 260-61, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1 (1995). The State cites to no authority for its argument, which contradicts established Washington caselaw, that there is no subjective element to the "reasonable fear" element. The State failed to prove beyond a reasonable doubt in this case that Officer McMurtrey was placed in

actual and reasonable fear that a threat to kill would be carried out. Therefore, Mr. Cordova's conviction for felony harassment must be reversed.

2. THE ERRONEOUS ADMISSION OF CHARACTER EVIDENCE THAT SHOULD HAVE BEEN EXCLUDED UNDER ER 404(B) WAS NOT HARMLESS.

The trial court permitted, over defense objection, Officer McMurtrey's testimony that he was told by dispatch that Mr. Cordova had been noted as a code "T3," meaning "officer caution" and that he was an "armed career criminal." 2RP 145-47. The accuracy and foundation for these notations was disputed by the defense. 2RP 149-51. The appellant's brief fully sets forth why this unproved character evidence should have been excluded under ER 404(b). App. Br. at 8-18.

However, while citing this testimony as support for the jury's verdict in this case, Resp. Br., at 3, the State still argues that the admission of this testimony "could not have changed the outcome of this case." Resp. Br., at 6. As set out in the Appellant's Brief, the inflammatory nature of this unproved character evidence likely did have an affect on the jury, especially where, as here, the State has presented insufficient evidence to prove the officer's actual

reasonable fear that the threat would be carried out. See, App. Br. at 18-19. Therefore, this error was not harmless.

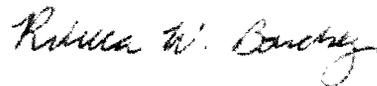
C. CONCLUSION

The Appellant's Brief correctly states that the State was required to prove that the alleged victim of the felony harassment, Officer McMurtrey, had an actual and objectively reasonable fear that the threat to kill would be carried out. The State failed to provide sufficient evidence that Officer McMurtrey had an actual and reasonable fear. In addition, the trial court's erroneous admission of unproved character evidence was not harmless. The felony harassment conviction must be reversed.

DATED: August 27, 2012

Respectfully submitted,

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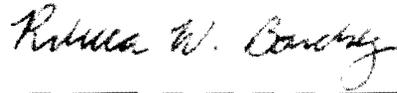
CERTIFICATE OF SERVICE

I certify that on the day of , I caused a true and correct copy of this Appellant's Reply Brief to be served on the following:

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State v. Rudy Cordova

No. 30653-4-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 27th day of August, 2012, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 27th day of August, 2012.

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