

64107-7

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NO. 64107-~~7~~⁷-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

Horace Glenn Graham,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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JIM ROGERS

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A. ISSUE PRESENTED

1. Should this court dismiss Mr. Graham's felony conviction for felony harassment as Appellant contends the State did not prove all elements of the crime beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The King County Prosecutor's Office charged Horace Glenn Graham with second degree assault and felony harassment. CP 16-17. Mr. Graham waived his right to a jury trial and the case was heard by Judge Rogers. CP 15.

Mr. Graham and Mr. Stewart's memories about what occurred on the night of their incident varied substantially, and the Court weighed in on the credibility of each of them in making its findings. RP 95-98.

On June 10, 2009, the Court made its decision in the bench trial. RP 92. Judge Rogers noted that both Graham and Stewart were drinking on the night in question, and that their judgments may have been impacted because of this. RP 93 He commented that witnesses who testified had consumed alcohol that night, saying "it's always fraught for danger with any jury or judge to determine facts in a case where the behavior of the parties was fueled by alcohol. Nevertheless, I have done my best looking at the evidence and considering the credibility of the parties...". RP 93.

The Court found Mr. Graham guilty of felony harassment and not guilty of assault in the second degree, noting a valid self defense claim was presented in during the defense case. RP 95-99. The court found that, while the evidence showed that Graham hit Stewart with a pistol, which caused injuries which would have qualified as second degree assault, but that "essentially he acted in self-defense on that evening" which was acceptable *when he was inside his property line*. RP 97. (emphasis added).

The court went on to find that Graham exceeded the scope of reasonableness once he went outside his property and forced Stewart to take off all his clothes and made threats to Stewart, placing him in reasonable fear that the threats would be carried out. RP 98. The threats were of bodily harm and the victim "was in reasonable fear of his life and ... felt threatened" according to the Court on page 98 of the proceedings.

The Court noted that all the elements of the crime charged of felony harassment were proven by the State in its Conclusions of Law section. Findings of Fact 2-3.

2. SUBSTANTIVE FACTS

Mr. Graham was the employer of Mr. Stewart and several other men who helped him remodel Graham's property in Seattle. The property was a house. Findings of Fact 1. The two were friends outside of their employer employee relationship. Id. On the night of September 8 into the

morning hours of September 9, 2008 the two were drinking at Graham's house when Graham became convinced that Mr. Stewart stole his money and wallet. Findings of Fact 2. They had been in the garage. Findings of Fact 1. RP15-20. They both left the garage at different times. Findings of Fact 1. RP 26. Graham confronted Stewart about his concerns. Findings of Fact 1. RP 30. He did this after having gone back in the garage and getting a 40 caliber pistol which he had stored under his mattress. Findings of Fact 2. RP 30.

At trial, Graham claimed he thought Stewart might grab for a knife he is known to carry once Graham confronted him about the possible theft. Findings of Fact 2. RP 31-33. Graham hit him with the pistol, at which point Stewart admitted he took several items, and threw the items at Graham's feet. Findings of Fact 2. RP 31-35, 116. (Stewart later got stitches to repair the damage. RP 129.)

Graham grabbed Stewart by the shirt and escorted him with force from the property, all the while making comments to Stewart. Findings of Fact 2. RP 36, 119-123. According to Stewart, he was assaulted during this escort off the property. RP 120-124. He told Stewart to take his clothes off. Findings of Fact 2. RP 123-124. He threatened him with bodily harm. Findings of Fact 2. Graham cocked his gun and pointed it at Stewart. RP 126. He told Stewart "I kill you and stuff like that" according to Stewart's testimony. RP 133. And, after Graham was hitting him, he

said "I need to kill your black ass." RP 138. Stewart was in reasonable fear by these threats, and was scared for his life. Findings of Fact 2.

ARGUMENT

1 THE COURT DID FIND THE NECESSARY ELEMENTS OF FELONY HARASSMENT BUT LISTED THE ELEMENT OF THREAT TO KILL UNDER CONCLUSIONS OF LAW INSTEAD OF FINDINGS OF FACT

When findings of fact are supported by evidence, none that are truly findings of fact will be disturbed on appeal. State v. Williams, 96 Wn2d 215, 220-21 (1981); Valentine v. Dept. of Licensing, 77 Wn.App. 838, 846 (1995).

In Williams a party disclosed dispute with conclusions drawn from the facts. Some of these conclusions were erroneously labeled findings of fact. The Court of Appeals determined that "Conclusions of law cannot be shielded from review by denominating them findings of fact." Id.

In this case, the court took information properly detailed as "findings of fact" in the "conclusions of law" section, however, doing so does not change what they are: findings of fact. The Court Appeals has noted that "We are firmly committed to the rule that when findings of fact are supported by evidence, none that are truly findings of fact will be disturbed on appeal." Firefighters Local 1296 v. Kennewick, 86 Wash.2d 156, 161, 542 P.2d 1252 (1975). It is one of many functions of an

is incorrectly denominated a finding of fact, it is subject to review." Id. at 161-62, 542 P.2d 1252; State v Washington Tug and Barge Co., 140 Wash. 613, 250 P. 49 (1926).

‘A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.’ Leschi Improvement Council v. Highway Comm'n, 84 Wash.2d 271, 283, 525 P.2d 774 (1974). Where findings necessarily imply one conclusion of law the question still remains whether the evidence justified that conclusion. Cline v. Altose, 158 Wash. 119, 126, 290 P. 809, 70 A.L.R. 1471 (1930). It may determine that the appropriate findings of fact were made and simply put in the wrong section of the document, as this Court should do. The appropriate findings were made although they are listed under conclusions of law.

2 EVEN IF THE FINDINGS ARE AMBIGUOUS THE COURT'S ORAL RULING CONTAINS THE MISSING FINDING

Case law holds that the court's oral decision can supplement the written findings so long as the two are not inconsistent, which is the case here. (See Johnson v. Dept of Licensing, 71 Wn. App 326, 332 (1993); State v. Moon, 48 Wn.Ap 647, 653 (1987), In re LaBelle, 107 Wn.2d 196, 219 (1986).

because I find it difficult to imagine how someone would take their clothes off voluntarily, and listening to Mr. Stewart about this, and listening to the statements he made after the event, I accept Mr. Stewart's testimony that he was in reasonable fear of his life and that he felt threatened." RP 97-98. As this Court can see from reviewing the testimony, the "threats" referred to by the Court were threats to kill, as testified to in Mr. Stewart's testimony.

Mr. Stewart said that Mr. Graham said he'd "kill your black ass" (RP 133), "I kill you and stuff like that (RP 133), that "After he cocked the gun. I mean, I can, I couldn't handle it, but I can take the whacking. But when he cocked the gun, and his eyes, it looked like the devil or something and I was scared for my life at that time. I said forget it, I'm going to die, you know." (RP 138) These were the threats that Stewart testified Graham made to him. He did not testify that any other threats were made aside from these.

As indicated in the court's findings, the victim felt his life was threatened and that his life was in danger based on the words and conduct of the defendant in this case. Findings of Fact, 1-3.

3 IF THIS COURT IS NOT PERSUADED BY THE TWO PRIOR ARGUMENTS, THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT FOR ADDITIONAL FACT-FINDING ON THIS ELEMENT BASED SOLELY ON THE EVIDENCE ALREADY IN THE RECORD

Adequate written findings are essential to “permit meaningful appellate review.” The purpose of written findings is to allow the reviewing court to determine the basis on which the case was decided, and to review the issues raised on appeal. The findings must state the *ultimate* facts related to each element of the crime. See In re Woods, 20 Wash.App. 515, 581 P.2d 587 (1978).(emphasis added).

In State v. Alvarez, 128 Wn.2d 1 (1995), the Appeals Court held that Alvarez was not denied his right to a fair trial even though the trial court did not enter findings of ultimate facts. The Court found that "an error by the court in entering judgment without findings of fact and conclusions of law is remedied by subsequent entry of findings, conclusions, and judgment." State v. Mercy, 55 Wash.2d 530, 532, 348 P.2d 978 (1960).

The trial court in this case entered findings of fact and conclusions of law which should be sufficient. But, if this Court is not satisfied that the findings stated ultimate facts on each element of the offense required, then it should remand this case for an additional fact finding on this element based *solely* on the existing record. "If findings of fact and

conclusions of law do not state 'ultimate' facts, that error can be cured by remand." *See generally Alvarez.*

There was testimony about threats to kill being made in conjunction with a gun being cocked and pointed at the victim. RP 133-138. As such, if this Court determined remand is appropriate, the findings can and will be modified based on that trial testimony.

CONCLUSION

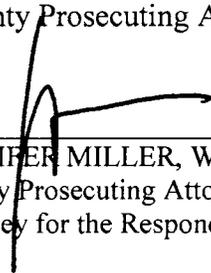
Graham was appropriately found guilty of felony harassment. This Court should find the element of threat to kill was found, but listed under conclusions of law. Case law indicates that this is not a reversible issue on appeal. Even if this Court were not persuaded that the conclusions of law were satisfactory, the oral ruling made should cure that issue.

In the alternative, should this Court not find itself persuaded by either of the these arguments, Respondent asks that this Court remand to the trial court for additional fact-finding on this element based solely on the evidence already in the record pursuant to State v. Alvarez.

DATED this 14th day of JUNE 2010

RESPECTFULLY submitted,

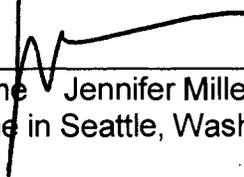
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington 98101, containing a copy of the **respondent's brief**, in STATE V. HORACE GRAHAM, Cause No. 64107-7-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Jennifer Miller
Done in Seattle, Washington

June 14 '10
Date JUNE 14, 2010

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