

64508-1

64508-1

COA NO. 64508-1-I

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

REC'D
JUN 30 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

WILLEM A. VAN HEUVEN,

Appellant.

FILED
2010 JUN 30 PM 3:49
CLERK OF COURT
JANET M. HARRIS

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

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Trial</u>	2
C. <u>ARGUMENT</u>	12
1. THE CONVICTIONS ARE BASED ON INSUFFICIENT EVIDENCE BECAUSE THE STATE FAILED TO PROVE THE PARENTS WERE THE OBJECTS OF VAN HEUVEN'S THREATS.	12
2. THE TRIAL COURT LACKED THE AUTHORITY TO IMPOSE TWO YEARS PROBATION FOR A ONE YEAR SUSPENDED SENTENCE.	19
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Phelan</u> 97 Wn.2d 590, 647 P.2d 1026 (1982).....	20
<u>State ex rel. Schock v. Barnett</u> 42 Wn.2d 929, 259 P.2d 404 (1953).....	21
<u>State v. Anderson</u> 96 Wn.2d 739, 638 P.2d 1205 (1982).....	19
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	21
<u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	20
<u>State v. C.G.</u> 150 Wn.2d 604, 80 P.3d 594 (2003).....	13, 15, 18
<u>State v. Campbell</u> 125 Wn.2d 797, 888 P.2d 1185 (1995).....	12
<u>State v. Chapin</u> 118 Wn.2d 681, 826 P.2d 194 (1992).....	12
<u>State v. Colquitt</u> 133 Wn. App. 789, 137 P.3d 892 (2006).....	16
<u>State v. DeVries</u> 149 Wn.2d 842, 72 P.3d 748 (2003).....	19
<u>State v. Enlow</u> 143 Wn. App. 463, 178 P.3d 366 (2008).....	12
<u>State v. Garvin</u> 166 Wn.2d 242, 207 P.3d 1266 (2009).....	18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980).....	16
<u>State v. Hall</u> 35 Wn. App. 302, 666 P.2d 930 (1983).....	21
<u>State v. Hutton</u> 7 Wn. App. 726, 502 P.2d 1037 (1972).....	16
<u>State v. J.M.</u> 144 Wn.2d 472, 28 P.3d 720 (2001).....	13, 14, 15, 17
<u>State v. Jacobs</u> 121 Wn. App. 669, 89 P.3d 232 (2004).....	16
<u>State v. Kiehl</u> 128 Wn. App. 88, 113 P.3d 528 (2005).....	15
<u>State v. Kilburn</u> 151 Wn.2d 36, 84 P.3d 1215 (2004).....	13, 15
<u>State v. Madison</u> 53 Wn. App. 754, 770 P.2d 662 (1989).....	1
<u>State v. Monday</u> 85 Wn.2d 906, 540 P.2d 416 (1975).....	20
<u>State v. Phelps</u> 113 Wn. App. 347, 57 P.3d 624 (2002).....	20
<u>State v. Schaler</u> 145 Wn. App. 628, 186 P.3d 1170 (2008).....	15
<u>State v. Smith</u> 155 Wn.2d 496, 120 P.3d 559 (2005).....	12
<u>State v. Stevenson</u> 128 Wn. App. 179, 114 P.3d 699 (2005).....	18

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

In re Winship

397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 12

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.04.110 13

RCW 9A.46.020 13, 14, 15

RCW 9.92.060 1, 19, 20

RCW 9.92.064 1, 20

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support appellant's convictions for felony and misdemeanor harassment.

2. The trial court erred in finding "When Mr. Van Heuven approached the defendant the defendant expressed a clear reiteration of his earlier threats to kill when he stated 'what do you think I'm going to do to you when I'm out in a couple days and pumped up on meth.'" CP 14 (FF B.40).¹

3. The trial court erred when it ordered two years of probation for a one year suspended sentence.

Issues Pertaining to Assignments of Error

1. Appellant's parents believed they were the objects of appellant's threats, but substantial evidence does not establish appellant knowingly directed threats toward either his mother or father. Is reversal of the harassment convictions required because there is insufficient evidence appellant knowingly threatened his parents?

2. Under the plain language of RCW 9.92.060 and RCW 9.92.064, the court may not order probation on a suspended sentence

¹ The trial court's written "Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d)" are attached as appendix A.

exceeding one year. Did the court lack statutory authority to order probation for two years?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Willem A. Van Heuven with two counts of felony harassment (threat to kill) against his parents. CP 7-8. Following a bench trial, the court convicted Van Heuven of one count of felony harassment against the father and one count of misdemeanor harassment against the mother. CP 11-15. The court imposed three days confinement for the felony conviction and a one-year suspended sentence for the misdemeanor conviction. CP 19, 22-25. This appeal follows. CP 17-18.

2. Trial

Van Heuven's parents are Willem H. Van Heuven (hereinafter "the father") and Bertha Van Heuven (hereinafter "the mother"). CP 12 (FF B.1). Van Heuven was living in a rental property until 2004 or 2005, at which point his parents noticed he had begun to accumulate a large number of belongings and was having a difficult time paying his bills, having enough to eat, and appropriately grooming himself. CP 12 (FF B.2). Van Heuven's parents invited their son to move in with them. CP 12 (FF B.3). Van Heuven moved into an apartment above the detached garage. CP 12 (FF B.4).

Van Heuven's condition subsequently appeared to deteriorate, as he seemed to have difficulty managing his affairs and expressed anger and suspicion on an increasing basis. CP 12 (FF B.5). For example, Van Heuven was concerned someone was tampering with his car and he sometimes slept in his car or barricaded it with boards to prevent tampering. CP 12 (FF B.6). Van Heuven also barricaded the garage and the outside dog run because he was concerned people tampered with his belongings. CP 12 (FF B.7).

He began referring to his enemies as "inbreds." CP 12 (FF B.8). Van Heuven initially directed the term "inbreds" towards neighbors who had previously moved out of state eight months before. CP 12 (FF B.9); 2RP 12, 29.² Van Heuven talked about this group of "inbreds" many times over the course of 2008: "It was probably daily that he was talking about them and that they were coming over and doing things to his car and breaking into his apartment and at one point was poisoning his dog." 2RP 11. He said he was being watched and followed. 2RP 11. He put up detection cameras "mainly for what he called the inbreds, and the inbreds were either existing people or imaginary people that were after him, to do him harm." 2RP 48-49.

² The verbatim report of proceedings is referenced as follows: 1RP - 9/21/09; 2RP - 9/22/09; 3RP - 9/23/09; 4RP 11/20/09.

Van Heuven ranted about the inbreds off and on all the time, saying things to the neighbors like "I'm going to do you in." 2RP 14. The mother testified "He kind of uttered that he was going to kill somebody. He never said that directly to me, but it was very scary listening to the talk." 2RP 14. When he became enraged, the mother "was afraid that he was going to forget that I was his mother. You know, I just hoped he didn't forget that we were his parents and think we are the inbreds." 2RP 14.

In speaking with his father, Van Heuven had said "If you're not for me, then you're against me." 2RP 59. Over the course of the previous three years, Van Heuven expressed anger and frustration that his parents did not believe he was being watched. 3RP 60-61. The father had the "impression" that he was "[o]n the side of the inbreds or at least the ones that were against him." 2RP 61. That impression was based on "the conclusion that if you are not for me, you are against me. That's it in a nutshell." 2RP 61.

Later on, the mother also felt she was included in the group he was yelling at or making threats toward: "In the beginning, it was just the neighbors, but then he started including us. He kept saying, 'If you're not with me, you're against me.' He thought my husband was spying on him." 2RP 14-15. With reference to Van Heuven describing the neighbors as

"inbreds," the mother testified "I think we were probably included in the same word 'inbred' later on because he felt that we were part of his problem." 2RP 10. She thought he felt this way because "he became so angry with us, and he wasn't happy. No matter what we did, it wasn't right." 2RP 10. During the past year, he accused both of them of spying on him. 2RP 30-32, 60.

Van Heuven's increasing paranoia manifested itself as anger towards those around him. CP 12 (FF B.8). Van Heuven's relationship with his parents became strained because his parents believed he was suffering from a mental health issue rather than actually being watched. CP 12 (FF B.10). Van Heuven and his mother retained some connection through preparing her son's meals and laundering his clothes. CP 12 (FF B.11). Van Heuven expressed more hostility to his father. CP 13 (FF B.15). Their relationship was more difficult because the father expressed disappointment over his son's hoarding, inability to maintain employment, and difficulty in proactively dealing with his problems. CP 12 (FF B.12).

Van Heuven's exhibited intimidating behavior by stating his parents did not do anything right, using foul language, and slamming doors, cabinets and a table. CP 13 (FF B.16). Van Heuven carried a loaded revolver on his hip and wore a sheathed knife around his neck on a regular basis. CP 13 (FF B.17). He did not display the gun. 3RP 33.

The charging period for harassment was from October 19 to October 23, 2008. CP 7-8. Between October 19 and 22, Van Heuven had periods each evening where he was screaming threats to kill the "inbreds" as a group. CP 13 (FF B.18); 2RP 58. When he was ranting and raving during this four day period, he was "angry with everybody and at everything." 2RP 34. He was ranting at the world. 2RP 34. He was ranting at the neighbors who had moved away. 2RP 34; 3RP 22. The only thing different from before was the frequency and duration of the screaming. 3RP 22-23.

These screaming periods came in waves. CP 13 (FF B.19). Van Heuven's screaming was mostly done within earshot of the house. CP 13 (FF B.20). He ranted inside the house and outside on the deck. 2RP 34. He did not come upstairs, where his parents mainly stayed. 2RP 15-16, 34-35, 62. He never said he was going to kill his mother to her face. 2RP 34. He never said he was going to kill his father to his face. 2RP 34-35.

The father and mother agreed their son never called either one of them an inbred. 2RP 30, 38; 3RP 36. According to the father, he "might" have said "You're all inbreds" in the past. 3RP 36.

The father said his son was essentially talking and screaming at the woods and the trees during the four day period: "Obviously, I don't think he knew who he was screaming at. I think he was out of control and out

of it." 3RP 23. "In between he would make reference to the fat boy or the neighbors or inbreds or people in general. I don't know. So I said he was screaming at the trees." 3RP 23-24.

When asked the kind of things Van Heuven was ranting about, the father responded "he was going to do in everybody that was around, and how he was going to come and get them. He would take them with him, and he wouldn't be taken alive and a number of specifics were uttered toward our neighbor boy, who didn't live there anymore." 2RP 58. He referred to this former neighbor as "fat boy." 2RP 58. The father continued "some of this was directed to him and some of it was inclusive to whoever, which, in fact, we felt included us." 2RP 58.

The father reached a conclusion that he and his wife were included amongst the "inbreds" because "the inbreds was a name for those that were against him and included was inclusive of everybody that was against him. He made the statement, 'If you're not for me, you're against me,' and, as I also stated, because of the difference of belief, we were considered against him, and he, himself, made that statement on occasion, 'You're all against me.'" 3RP 35-36; CP 12 (FF B.9). According to the father, Van Heuven followed up on that statement at one point by saying "and everybody is against me is an inbred, or something along those lines." 3RP 25.

Van Heuven never directly threatened to kill his parents. 3RP 24. According to the father, "[i]t was always in a bit of a roundabout way." 3RP 43. The mother said her son never physically threatened her. 2RP 32.

The screaming on October 22 frightened his parents the most. CP 13 (FF B.21). Van Heuven was again angry at everybody and everything. 2RP 16. On the night of October 22, the father was afraid Van Heuven would kill him and his wife based on his threats to "do in" the "inbreds" and to rip out their hearts. CP 13 (FF B.25). Van Heuven talked about putting "people" down or taking "people" with him. 2RP 62-63. He said "I'm going to do them in" or "I'm going to kill them." 3RP 44. According to the father, Van Heuven "was saying and repeated what he had been saying all along. I think that fear overcame us, and we could not really grasp exactly the words specifically, but ongoing rage." 2RP 62.

According to the mother, "he was talking about killing people, but not directly at us, but it was just a general statement. It was mainly the fact that 'if you aren't with me, you're against me.' So we felt that we were included in that group that he was going to harm." 2RP 16-17. He did not use that phrase on October 22nd. 2RP 17. Instead, "[h]e made a lot of general statements." 2RP 17.

The mother "assumed" his rants included his parents: "He didn't say our names, but since he included us in the so-called inbreds, I think he

was referring to us at times. I don't know. I would have to assume that because he was very angry at us." 2RP 37-38. She assumed the threats "were for anybody around." 2RP 41. Again, he did not use her name, but she felt threatened. 2RP 41.

She felt they were included in the group that was against him on the 22nd because he was "so angry" and she "had the feeling that he might do something to us." 2RP 17. They were afraid something might happen on the 22nd because "I was afraid in his rage and anger that he would forget that we were his parents and maybe come upstairs and shoot us so we did not know." 2RP 18. The mother did not know if her son was in control of himself. 2RP 41.

Van Heuven never made a direct threat during the four day period. 3RP 42. He repeated a statement on many previous occasions to the effect of "I'm going to rip you're heart out through your throat and pull your head down through your ass and put you down." 3RP 46. That was the gist of all the outbursts. 3RP 46. This statement or a version of it was repeated the night of October 22. 3RP 46. That statement was made to "the inbreds." 3RP 47.

As a result of their fright, the father retrieved his own gun and kept it with them. CP 13 (FF B.22). His parents considered calling the police that night but were concerned about a confrontation between the police

and their son. CP 13 (FF B.23). Van Heuven's behavior eventually subsided. CP 13 (FF B.24).

On the morning of October 23, the mother left for work. CP 13 (FF B.28). When the father offered to make breakfast, Van Heuven replied he would not accept anything from his father. CP 13 (FF B.29-30). The father became frightened because he received a hostile response to a non-confrontational question, and had a gut feeling something would happen if he did not leave. CP 14 (FF B.31). The father took the clothes his wife had earlier packed and left. CP 14 (FF B.32).

The father called a crisis clinic to get help for his son. CP 14 (FF B.33). When the clinic declined assistance, the father reported what happened to the sheriff's office. CP 14 (FF B.34-35). The father had come to believe the only way for his son to get mental health treatment was to call the police, which he believed would result in a mental health evaluation, prescribed medication and perhaps supervision. 3RP 16-22, 31-32.

Detective Allen and other officers went to the residence. CP 14 (FF B.35). Allen was acquainted with Van Heuven because both had gone to the same university and been in the Marine Corps together. 1RP 25; 3RP 30. When Allen called for Van Heuven to come out of the house, Van Heuven cooperated and was taken into custody without incident. CP

13 (FF B.37); 1RP 27-28, 38. Van Heuven had been sick and looked ill. 1RP 27, 39. He showed officers the sheathed knife around his neck when arrested. CP 13 (FF B.38); 1RP 40. He also brought his gun to one of the officers.³ 1RP 42. Police did not seize the knife and gun at the time of arrest because the detective did not believe these items formed a part of the allegations against Van Heuven. 1RP 53-54.

After being placed in a patrol car, Van Heuven asked to speak with his father. CP 14 (FF B.39). When the father approached, Van Heuven said the father "had done it all wrong" and "should have been after the neighbors for trespassing and for putting little chips in his shoes." 2RP 70-71. He also stated "When I'm released in a couple of days and bumped up with methamphetamine, what do you think I'm going to do to you?" 2RP 71.⁴ This statement saddened and frightened the father. CP 14 (FF B.41).

³ Detective Allen earlier testified Van Heuven's father showed the gun to the detective. 1RP 30, 36.

⁴ Detective Allen was with the father at the patrol car and could not remember if Van Heuven said anything to his father. 1RP 39, 45-46.

C. ARGUMENT

1. THE CONVICTIONS ARE BASED ON INSUFFICIENT EVIDENCE BECAUSE THE STATE FAILED TO PROVE THE PARENTS WERE THE OBJECTS OF VAN HEUVEN'S THREATS.

The State failed to prove Van Heuven knowingly threatened his parents. Both convictions must be reversed and the charges dismissed with prejudice.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

To sustain conviction following a bench trial, (1) the evidence must support the findings of fact; (2) the findings of fact must support the conclusions of law; and (3) the conclusions of law must support the judgment. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). Questions of law are reviewed de novo. State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995).

A person is guilty of misdemeanor harassment if (1) the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person; and (2) the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i) and (b); see also State v. Kilburn, 151 Wn.2d 36, 43, 54, 84 P.3d 1215 (2004) (criminal harassment statute only prohibits "true threats").

A person is guilty of felony harassment if "the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person." RCW 9A.46.020(2)(b)(ii). In order for a felony harassment conviction to be upheld, the State must prove the person threatened was placed in reasonable fear that the threat to kill would be carried out, not just fear that bodily injury would be inflicted. State v. C.G., 150 Wn.2d 604, 607-08, 612, 80 P.3d 594 (2003).

"Threat" is defined as "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(27)(a). "Knowingly threatens" means that "the defendant must subjectively know that he or she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat to cause bodily injury to the person threatened or to another person." State v. J.M., 144 Wn.2d 472, 481, 28

P.3d 720 (2001). "Under RCW 9A.46.020(1)(a)(i), the person threatened is generally the victim of the threat, i.e., the person against whom the threat to inflict bodily injury is made." J.M., 144 Wn.2d at 488.

The evidence in this case is insufficient to show either the father or the mother was "the person threatened" and that Van Heuven "knowingly" directed his threats toward these two individuals.

In criminal harassment cases, words are important. They form the basis for conviction. It is therefore appropriate to scrutinize them and the context in which they occur.

The court found Van Heuven had periods between October 19 and 22 where he was screaming threats to kill the "inbreds" as a group. CP 13. The court did not find Van Heuven ever called either of his parents an "inbred." Indeed, their testimony shows he did not in fact ever identify them as such. 2RP 30, 38; 3RP 36.

During the charging period of October 19 through 22, he made general statements directed toward others. 2RP 16-17. The father testified "Obviously, I don't think he knew who he was screaming at." 3RP 23. He was "angry with everybody and at everything." 2RP 34. He was ranting at the world. 2RP 34. He was ranting at the neighbors who had moved away. 2RP 34; 3RP 22. Van Heuven referenced "the fat boy

or the neighbors or inbreds or people in general." 3RP 24. He did not say his parent's names at all. 2RP 38, 41; 3RP 42.

The evidence is insufficient to show Van Heuven, in ranting at "the inbreds," knowingly included his parents in the group of people he ranted against. It appears no case has directly addressed the issue of what level of specificity is needed to prove an alleged victim of harassment is "the person threatened" under RCW 9A.46.020(1). In other cases, the "person threatened" was clear. See J.M., 144 Wn.2d at 475 ("I'd only kill Mr. Sharper, Mr. Hashiguchi, and Mr. Boyd."); State v. Kilburn, 151 Wn.2d 36, 39, 40, 84 P.3d 1215 (2004) (student charged with harassing K.J. after stating "I'm going to bring a gun to school tomorrow and shoot everyone and start with you [K.J.]"); C.G., 150 Wn.2d at 607 ("I'll kill you Mr. Haney, I'll kill you."); State v. Schaler, 145 Wn. App. 628, 633-34, 186 P.3d 1170 (2008) (defendant told mental health evaluator he wanted to kill his two neighbors); State v. Kiehl, 128 Wn. App. 88, 90, 113 P.3d 528 (2005) (defendant told mental health counselor "this was all Judge Matheson's fault" and "he was going to kill him.").

In those cases, specific people were threatened. That is not what we have here. Instead, we have threats directed toward a group of people, some of whom were imaginary or no longer lived in the neighborhood.

The mother "assumed" Van Heuven's rants included his parents because he was angry at them. 2RP 38. She "assumed" the threats were for anybody around." 2RP 41. The father "felt" or had the "impression" they were included in the group of "inbreds." 2RP 58, 61.

But in determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). To withstand constitutional scrutiny, the verdict against Van Heuven must be supported by substantial evidence that supports a finding of guilt beyond a reasonable doubt as measured by a rational trier of fact. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); State v. Jacobs, 121 Wn. App. 669, 680-81, 89 P.3d 232 (2004). The mother's assumption and the father's feelings amount to speculation, which is not substantial evidence. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

The court found the mother was afraid her son would kill or injure them "if the defendant were to forget that they were his parents." CP 13 (FF. B.26). This is an accurate reflection of her testimony,⁵ but it undermines the conclusion that Van Heuven knowingly directed threats toward his parents. When he became enraged, the mother "was afraid that he was going to forget that I was his mother. You know, I just hoped he

⁵ See 2RP 14, 18.

didn't forget that we were his parents and think we are the inbreds." 2RP 14. To "knowingly threaten" someone, the defendant must subjectively know that the communication he imparts is a threat to cause bodily injury to the person threatened. J.M., 144 Wn.2d at 481. If Van Heuven had to *forget* they were his parents in order to think they were "the inbreds," then it follows Van Heuven did not "knowingly" threaten his parents.

The court found the father and mother believed their son included them in the group known as the "inbreds" based on their son's words and actions over the previous year, where he had said they were "against him" and "part of the problem." CP 13 (FF B.27). This finding does not support the legal conclusion that Van Heuven knowingly threatened his parents during the charging period at issue. His parent's feelings or conclusions about whether they were included among the group of "inbreds" to which Van Heuven directed his threats does not answer the question of whether the State proved they actually were "the persons threatened" during the charging period and that Van Heuven "knowingly" directed threats towards them. Those are two separate questions. They should not be conflated.

The court found "the defendant indicated that his parents were 'against him' through both his words and actions." CP 13 (FF B.15). Evidence may support that proposition as a general matter. But in the

absence of specific evidence that Van Heuven knowingly included his mother and father in the group of people he threatened during the charging period, such a finding is insufficient to support conviction.

An October 23rd statement attributed to Van Heuven needs to be addressed. The court wrongly found "When Mr. Van Heuven approached the defendant the defendant expressed a clear reiteration of his earlier threats to kill when he stated 'what do you think I'm going to do to you when I'm out in a couple days and pumped up on meth.'" CP 14 (FF B.40).

To withstand appellate scrutiny, factual findings must be supported by substantial evidence. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Evidence is substantial only if it is sufficient to persuade a fair-minded, rational person of the finding's truth. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

The quotation itself is wrong. According to the father, Van Heuven said "When I'm released in a couple of days and bumped up with methamphetamine, what do you think I'm going to do to you?" 2RP 71. This statement was phrased in the form of a question that did not specify what he was going to do to his father. The court's finding omits the question mark at the end of the statement.

In any event, this question is not sufficient evidence that Van Heuven threatened *to kill* his father on October 23. See C.G., 150 Wn.2d

at 607-08, 612 (felony harassment conviction requires reasonable fear of threat to kill and that such threat will be carried out). The question posed to the father is open ended. It does not allude to killing his father. Furthermore, the question was not a "clear reiteration" of his earlier threats to kill one or both of his parents because, as explained above, the State did not establish he earlier threatened to kill his parents.

The harassment convictions must be reversed and the charges dismissed with prejudice because there is insufficient evidence to prove each element of those crimes. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The prohibition against double jeopardy forbids retrial. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE TRIAL COURT LACKED THE AUTHORITY TO IMPOSE TWO YEARS PROBATION FOR A ONE YEAR SUSPENDED SENTENCE.

The court imposed a one year suspended sentence for Van Heuven's gross misdemeanor conviction and gave him two years probation as part of that suspended sentence. CP 19. The sentence is void because the court lacked statutory authority to impose a term of probation exceeding the original one year sentence. Reversal and remand for resentencing is required.

The court suspended Van Heuven's misdemeanor sentence under the authority of RCW 9.92.060. CP 19. That statute provides:

Whenever any person is convicted of any crime . . . the superior court may, in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by the superior court, and that the sentenced person be placed under the charge of a community corrections officer employed by the department of corrections . . . upon such terms as the superior court may determine.

RCW 9.92.060(1).

RCW 9.92.064 specifically limits the period for which a sentence may be suspended under RCW 9.92.060:

In the case of a person granted a suspended sentence under the provisions of RCW 9.92.060, the court shall establish a definite termination date for the suspended sentence. The court shall set the date no later than the time the original sentence would have elapsed and may provide for an earlier termination of the suspended sentence.

Under this statute, "it is clear that [a] sentence could be suspended and probation imposed only for the period of time of the sentence which was actually imposed and thereupon suspended." State v. Monday, 85 Wn.2d 906, 908, 540 P.2d 416 (1975), overruled on other grounds, In re Phelan, 97 Wn.2d 590, 647 P.2d 1026 (1982). In this case, the court imposed a one year suspended sentence. Under RCW 9.92.064, it could place Van Heuven on probation for a maximum of one year.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999); see also State v. Phelps, 113 Wn. App. 347, 355, 57 P.3d 624 (2002) (defendant cannot

extend the trial court's sentencing authority by agreeing to a punishment in excess of statute). Courts have no inherent authority pertaining to suspended sentences or impose probation. State ex rel. Schock v. Barnett, 42 Wn.2d 929, 931, 259 P.2d 404 (1953). The terms of the statutes granting courts power to suspend sentences and impose probation are mandatory and the action of the court is void when the statutory provisions are not followed. Id.; State v. Hall, 35 Wn. App. 302, 305, 666 P.2d 930 (1983).

Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The trial court had authority in this case to suspend Van Heuven's sentence only for a period of one year. Because the court exceeded its authority when it placed Van Heuven on probation for two years, the matter should be remanded for imposition of no more than the maximum probationary term.

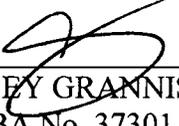
D. CONCLUSION

For the reasons stated, this Court should reverse the convictions. In the event this Court declines to reverse the convictions, then the erroneous portion of the misdemeanor sentence should be reversed.

DATED this 30th day of June, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorney for Appellant

APPENDIX A

- 1 2) Detective Scott Allen and Deputy James Young were both credible witnesses at trial. Detective Allen had been an acquaintance of the defendant when they had served in the Marine Corps together and their acquaintance did not create a negative bias on the part of the Detective. 2
3) Jane Morgan who appeared to be very fond of the defendant and who had sincere feelings for the defendant was not a credible witness at trial in part because of her feelings for the defendant and also because of her demeanor at trial. She appeared as though ^{willing to} she would say almost anything to relieve the defendant of criminal responsibility. However, even in light of this finding, Ms. Morgan's testimony was not significantly contradictory to the other witnesses. 3
4
5

6 B. The following events took place within King County, Washington:

- 6 1) Mrs. Van Heuven and Mr. Van Heuven (hereinafter collectively the "parents") are the married parents of the defendant.
7 2) The defendant was living in a rental property in Maple Valley up until 2004 or 2005, and before he moved out of his rental house, his parents noticed signs that the defendant was having a difficult time paying his bills, having enough to eat, and grooming himself appropriately and had begun to accumulate a large number of belongings. 8
9 3) Around that time, Mr and Mrs. Van Heuven invited the defendant to move back in with them.
10 4) When the defendant declined the offer of living inside the main house, it was decided that the defendant would move into an unfinished apartment above the parents' detached garage.
11 5) After the defendant moved into the garage apartment, his condition appeared to deteriorate as he seemed to have difficulty managing his affairs and he expressed anger and suspicion on an increasing basis.
12 6) For example, the defendant was concerned that mechanical problems with his car were the result of someone tampering with his car, and he sometimes slept in his car or barricaded his car with boards to prevent such tampering.
13 7) The defendant also barricaded the garage and the dog run outside the garage based on expressed concerns about people tampering with his belongings.
14 8) The defendant's increasing paranoia often manifested itself as anger toward those around him and he began referring to his enemies as "inbreds."
15 9) The defendant's first characterizations of the inbreds were focused on the neighbors and the son of the neighbors to the South, who had previously moved out of state some months prior to the charged time frame, but became a term he used to describe anyone that the defendant believed was "against him."
16 10) The defendant's relationship with his parents became strained as the defendant became aware that his parents did not believe that he was being watched, but instead believed that he was suffering from a mental health issue.
17 11) The defendant's relationship with his mother became strained as a result of these concerns but the defendant and his mother still had some connection through Mrs. Van Heuven's preparation of meals and taking care of the defendant's laundry.
18 12) The defendant's relationship with his father was more difficult as there was some disappointment expressed by Mr. Van Heuven over the defendant's hoarding of belongings, issues with maintaining employment, and difficulty with being proactive when dealing with the defendant's problems.
19 13) Mr. Van Heuven had sought advice from his personal physician, and both parents sought advice and information, and attended classes from the organization known as NAMI, and from 20
21
22
23

1 the Crisis Clinic for advice on how to best deal with the defendant's behavior, and his perceived
2 mental health issues.

3 14) Mr. and Mrs. Van Heuven had also offered to take the defendant to see a mental health
4 professional, but the defendant refused their offer.

5 15) The defendant's behavior towards both of his parents in time became hostile, although more
6 hostility was expressed to Mr. Van Heuven, and the defendant indicated that his parents were
7 "against him" through both his words and actions.

8 16) In particular, the defendant's behavior became intimidating by the use of foul language,
9 slamming of doors, cabinets and a table as well as statements that his parents didn't do anything
10 right.

11 17) In 2008, the defendant also, on a regular basis, carried a loaded revolver on his hip and wore
12 a knife in a sheath around his neck.

13 18) During the time frame of October 19 to October 22, 2008 the defendant's behavior escalated
14 and he had periods each evening where he was screaming threats to kill the "inbreds" as a group.

15 19) These screaming periods would come in waves and the defendant's tirades would last hours
16 but then would die down for hours as well.

17 20) The defendant's screaming was mostly done outside ^{in a corner of the house.} while the defendant was on the porch
18 around the house.

19 21) From October 19 to October 22, 2008, the severity of the screaming increased as the
20 defendant became louder and the length of his tirades increased leading to October 22 being the
21 most frightening to his parents.

22 22) During this time frame Mr. and Mrs. Van Heuven became so frightened by the defendant's
23 words and actions that Mr. Van Heuven got his own gun from his safe and kept it inside the
master bedroom where the two stayed for the entire evening of October 22, 2008, other than
when they were preparing or eating dinner.

24) On October 22, 2008, Mr. and Mrs. Van Heuven considered calling the police but were
concerned that if they called police the defendant would end up in a confrontation with the police
because there would be lights and sirens coming down their driveway in the dark.

25) At the moment where Mr and Mrs. Van Heuven picked up their phone and were about to call
the police around 11p.m. on October 22, 2008, the defendant's behavior subsided once again and
they did not call the police.

26) That night, Mr. Van Heuven was afraid that the defendant would kill him and Mrs. Van
Heuven based on the threats to "do in" the inbreds and to rip out their hearts.

27) That night, Mrs. VanHeuven was afraid that the defendant would injure her and that the
defendant might kill her and Mr. Van Heuven if the defendant were to forget that they were his
parents.

28) Mr. and Mrs. Van Heuven both believed that the defendant included them in the group
known as the "inbreds" based on the defendant's words and actions over the previous year where
he had said they were "against him" and "part of the problem."

29) The next morning, on October 23, 2009, Mrs. Van Heuven left for work having already
packed a bag of clothes in case she and Mr. Van Heuven needed to leave the house.

30) Mr. Van Heuven heard the defendant making noise in the kitchen and went downstairs to
cook breakfast.

31) When Mr. Van Heuven offered to make the defendant breakfast the defendant said he
32 wouldn't accept anything from his father.

- 1 31) At that moment, Mr. Van Heuven was frightened because he had received a hostile response from the defendant to a non-confrontational question, and had a gut feeling that something would
- 2 happen if he did not leave.
- 3 32) -Mr. Van Heuven took the bags of clothes he and his wife had packed and fled the home.
- 3 33) Mr. Van Heuven went to see a friend for advice and they called the Crisis Clinic in an attempt to get them to help.
- 4 34) When the Crisis Clinic declined assistance, ~~based on the concern that weapons were involved,~~ Mr. Van Heuven went to the North Bend substation of the King County Sheriff's Office.
- 5 35) When Mr. Van Heuven explained to the officers what had happened, the officers went to the Van Heuven's house in Preston, Washington to contact the defendant.
- 6 36) Detective Scott Allen offered his assistance in contacting the defendant because he believed he would be able to contact the defendant without incident.
- 7 37) When Detective Allen called out for the defendant to come out of the house, the defendant complied and was taken into custody without incident.
- 8 38) When arrested, the defendant was wearing the knife in a sheath around his neck that he had been known to carry.
- 9 39) After being placed in the patrol car, based on an arrest for a Domestic Violence incident, the defendant asked to speak to Mr. Van Heuven.
- 10 40) When Mr. Van Heuven approached the defendant the defendant expressed a clear reiteration of his earlier threats to kill when he stated "what do you think I'm going to do to you when I'm out in a couple days and pumped up on meth."
- 11 41) This statement both frightened and saddened Mr. Van Heuven and he and Mrs. Van Heuven spent the next three weeks away from home and stayed with their daughter.
- 12 42) The day after this incident, Mr. Van Heuven gave Detective Allen the knife the defendant had been wearing around his neck and the revolver the defendant was known to carry that had been found in a pile of the defendant's clothes in the laundry room inside the house.

14 And having made those Findings of Fact, the Court also now enters the following:

15 CONCLUSIONS OF LAW

16 I.

17 The above-entitled court has jurisdiction of the subject matter and of the defendant Willem A. Van Heuven in the above-entitled cause.

18 II.

19 The following elements of the crime(s) charged have been proven by the State beyond a reasonable doubt:

20 That in the State of Washington during a period of time intervening between October 19, 2008 and October 23, 2008, the defendant threatened to kill Willem Van Heuven, Sr and that Willem Van Heuven Sr. was placed in reasonable fear that the threat to kill would be carried out.

22 _____ That in the State of Washington during a period of time intervening between October 19, 2008 and October 23, 2008, the defendant threatened to kill Bertha Van Heuven and that Bertha Van Heuven was placed in reasonable fear that the threat to cause bodily harm would be carried out.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

III.

The defendant is guilty of the crime of Felony Harassment- Domestic Violence as charged in Count I of the amended information.

The defendant is not guilty of the crime of Felony Harassment- Domestic Violence as charged in Count II of the amended information. However, the defendant is guilty of the lesser included crime of Harassment- Domestic Violence based on Count II of the amended information.

IV.

Judgment should be entered in accordance with Conclusion of Law III.

V.

In addition to the above written findings and conclusions, the court incorporates by reference, without limitation, its oral findings of fact and conclusions of law as stated on the record.

DONE IN OPEN COURT this 26 day of October, 2009.



JUDGE CATHERINE SHAFFER

Presented by:


Samantha Kanner, WSBA #36943
Deputy Prosecuting Attorney

Approved as to form:


Gregory Fullington, WSBA # 30783
Attorney for Defendant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64508-1-I
)	
WILLEM A. VAN HEUVEN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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 30TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLEM A. VAN HEUVEN
207 1ST AVENUE NW, #1
ISSAQUAH, WA 98027

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*