

NO. 67649-1-I

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

REC'D

STATE OF WASHINGTON,

Respondent,

JUL 30 2012

v.

King County Prosecutor
Appellate Unit

DAVID COPELAND,

Appellant.

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

The Honorable Leroy McCullough, Judge

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
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A. ARGUMENT IN REPLY

1. WITHOUT AFFIRMATIVE EVIDENCE OF FEAR OF BODILY INJURY, RATHER THAN DEATH, THE COURT ERRED IN INSTRUCTING THE JURY ON MISDEMEANOR HARASSMENT.

The jury should not be instructed on a lesser-included offense unless there is affirmative evidence the lesser offense was committed to the exclusion of the greater. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 455, 6 P.3d 1150 (2000). Because the State has failed to point to any affirmative evidence warranting instructing the jury on misdemeanor harassment, Copeland's conviction should be reversed.

The State has not pointed to any affirmative evidence that McCormack feared only bodily harm and not death. Merely because Copeland had assaulted her without killing her in the past is not affirmative evidence of her state of mind. State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003), illustrates what constitutes affirmative evidence of misdemeanor rather than felony harassment. In that case, a high school student threatened to kill the vice-principal of her school. Id. at 606-07. Her conviction for felony harassment was reversed for insufficient evidence because the principal testified he was concerned she might harm him or someone else in the future, but did not testify he believed she would carry out the threat to kill him. Id. at 607, 610. The court specifically noted the State could charge

misdemeanor harassment if the threatened person feared only bodily injury. Id. at 611. While this case does not purport to create a minimum threshold for evidence of the lesser-included offense, it illustrates what may constitute affirmative evidence of the threatened person's mental state.

No such evidence exists in this case. To believe McCormack feared only bodily injury, the jury would have had to disbelieve her repeated assertions that she feared she would be killed and took his threats seriously. This lack of belief is insufficient to support an instruction for misdemeanor harassment. See Fernandez-Medina, 141 Wn.2d at 455 (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)). McCormack clearly and consistently testified she feared she would be killed. She testified, "I thought I was going to die." 3RP 174. She repeated again that she believed she was going to die, and that she believed the police arrival saved her life. 3RP 175, 177.

She said nothing to indicate mere fear of injury. The State relies on the fact that she had been assaulted, threatened, and abused, but not killed, in the past. But even in regards to past incidents, McCormack testified she took his threats very seriously at the time. 3RP 147. She even said that many times in the past she believed he was going to kill her. 3RP 183. The mere

fact that he did not actually kill her in the past does not amount to affirmative evidence that she reasonably feared bodily injury rather than death.

2. REPEATED MENTIONS OF COPELAND'S SEPARATION FROM HIS WIFE HEARKENED BACK TO THE IMPROPER REFERENCE TO HIS JAIL TIME AND, WHEN TAKEN CUMULATIVELY, REQUIRE A NEW TRIAL.

In violation of the court's ruling in limine, McCormack's daughter mentioned that Copeland had been in jail. 3RP 91. This alone would perhaps not have irretrievably marred the fairness of Copeland's trial. But the improper references did not stop there.

In her testimony, McCormack then repeatedly emphasized Copeland's absence in terms that evoked a jail sentence by depicting his absence as involuntary. She testified that immediately before February 15, 2011, Copeland was not living with them and was not there for New Years or Christmas. 3RP 124-25. She testified he had not been to the house at all during those last couple of months. 3RP 125. She testified the number of times she saw him in person leading up to the events in question was "zero." 3RP 125.

McCormack then referred to the duration of his absence in terms that evoked a jail sentence: she testified she realized she needed to end the relationship "during the 60 days in which he – he was not there." 3RP 128. During closing argument, the prosecutor again brought up Copeland's

absence, and this time directly tied it a prior bad act: “If there’s anything good that came out of this last assault, it’s that they lived apart for a couple of months after that.” 5RP 27.

The State argues there was no reason for the jury to infer McCormack was incarcerated as a result of the previous assault. Brief of Respondent at 23. But this argument ignores two important aspects of the case: the child’s previous mention that Copeland had been in jail, and the court’s recognition that McCormack was “playing fast and loose with the rules” and was not honoring the spirit of the court’s ruling excluding evidence of Copeland’s incarceration. 3RP 134. The prosecutor’s closing argument did not merely describe an argument, after which they lived apart for a time. He specifically referred to an “assault” and a separation that lasted “a couple of months,” hearkening back to McCormack’s description of his “60 days” of absence in terms used for jail sentences. 3RP 128.

After the child mentioned Copeland had been in jail, Copeland was prejudiced by McCormack’s testimony emphasizing his absence in terms used for jail sentences and the prosecutor’s argument referring to their separation pursuant to an assault. This was a serious irregularity with a cumulative effect that requires a new trial. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987); State v. Miles, 73 Wn.2d 67, 70-71, 436 P.2d 198 (1968).

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Copeland requests this Court reverse his conviction.

DATED this 30th day of July, 2012.

Respectfully submitted,

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

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| STATE OF WASHINGTON, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| vs. |) | COA NO. 67649-1-I |
| |) | |
| DAVID COPELAND, |) | |
| |) | |
| Respondent. |) | |

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 JULY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID COPELAND
5320 SW PARADISE LN
PORT ORCHARD, WA 98367

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY, 2012.

x Patrick Mayovsky

2012 JUL 0 0 PM 4:43

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