NO. 47405-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

Z.T.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

The Honorable Daniel Stahnke, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove all of the elements of felony harassment beyond a reasonable doubt, in violation of Z.T.'s constitutional due process rights.

2. The trial court did not explicitly find that the context or circumstances would have led a reasonable person to foresee that Z.T.'s statement would be interpreted as a serious threat to cause harm.

3. The trial court did not explicitly find that Z.T.'s statement was a "true threat."

4. Appellant assigns error to Finding of Fact 30, which provides:

> Eddie took the respondent's threat seriously. Eddie believed the respondent would carry out his threats to kill because the respondent is "unpredictable." The fact that the respondent became so enraged about his homework led Eddie to believe he could also do something as erratic as killing him and Julie. Further, the rage expressed by the respondent that day led Eddie to believe he could carry out his threats. In addition, Eddie believed the respondent could carry out his threats because he had ostensibly "calmed down" by the time he made threats. The fact that he uttered the threats in a calm and deliberate manner made Eddie believe they were credible.

Clerk's Papers (CP) 56.

5. Appellant assigns error to Finding of Fact 31, which provides:

> Eddie conveyed the threats that had been made by the respondent to Julie. Julie was scared. She also took the respondent's threats seriously. Julie believed the respondent would carry out his threats because he is very unpredictable. For example, the respondent's decision to run away was unpredictable. Julie also believed the respondent could carry out his threats because he does not apologize and he shows no remorse for his actions.

CP 56-57.

6. Appellant assigns error to Conclusion of Law 6, which provides:

> The respondent threatened to kill Eddie and Julie when he said "I'm going to f[]king kill you. I'm going to f[]king kill you guys."

CP 59.

7. Appellant assigns error to Conclusion of Law 7, which provides:

> Both Eddie and Julie took the respondent's threats seriously and both believed the respondent would carry out his threats to kill them, for the reasons listed in the court's findings.

CP 59.

8. Appellant assigns error to Conclusion of Law 8, which provides:

> For these same reasons listed in the court's findings, Eddie and Julie's fear was reasonable.

CP 59.

9. Appellant assigns error to Conclusion of Law 11, which provides:

> For each of the foregoing reasons, the State proved beyond a reasonable doubt that the respondent is guilty of Count 1: Assault 4; Count 2: Assault 4; Count 3: Felony Harassment—Threat to Kill, and Count 4: Felony Harassment—Threat to Kill.

CP 59.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted unless the State proves every element of the crime beyond a reasonable doubt. To prove the crime of felony harassment—threat to kill, the State must prove beyond a reasonable doubt not only that the defendant uttered a threat to kill, but also that it caused the person threatened in reasonable fear that the threat to kill would be carried out. Did the State sustain its burden of proof, where the alleged victims testified that the threat to kill occurred after one of the alleged victims hit the appellant twice, and testified that the appellant had previously been well-behaved prior to the incident? Assignments of Error 1 through 9.

2. A conviction for felony harassment requires proof that the accused person made a "true threat." Here, the trial court did not find that the context and circumstances would have led a reasonable person to

foresee that Z.T.'s statement would be interpreted as a serious threat to cause harm, only that the alleged victims' fear was reasonable. Must Z.T.'s felony harassment convictions be reversed and dismissed with prejudice? Assignments of Error 1 through 9.

C. STATEMENT OF THE CASE

1. Procedural history:

Appellant Z.T. was charged in the Juvenile Division of Clark County Superior Court with two counts of felony harassment—threat to kill, and two counts of fourth degree assault. CP 5; RCW 9A.46.020(2)(b) and (2)(b)(ii); RCW 9A.36.041. The prosecution alleged that Z.T. assaulted and threatened to kill his uncle Eddie Tennyson and his uncle's fiancée Julie Roberts on February 11, 2015. CP 5.

A fact-finding hearing was held before the Honorable Daniel Stahnke on March 11, 2015, after which the judge found Z.T. committed the offenses as charged, and entered Findings of Fact and Conclusions of Law. Report of Proceedings (RP) at 130-31[1]; CP 53-60. The court makes the following Conclusions of Law:

> The respondent threatened to kill Eddie and Julie when he said "I'm going to f[]ing kill you.... I'm going to f[]ing kill you guys."

[1] The record consists of the following hearings: February 12, 2015; February 17. 2015; March 9, 2015; March 11, 2015; (CrR 3.5 hearing, fact-finding, and disposition).

> Both Eddie and Julie took the respondent's threats seriously and both believed the respondent would carry out his threats to kill them, for the reasons listed in the court's findings.
>
> For these same reasons listed in the court's findings, Eddie and Julie's fear was reasonable.
>
> The court did not conclude that the statement was a "true threat."

CP 59.

The court imposed local sanctions of 28 days in detention, 12 months of community supervision, 24 hours of community service, $100.00 to be paid to the Crime Victim's Fund, and a $100.00 DNA testing fee. RP at 144.

Timely notice of appeal was filed on March 30, 2015. CP 33. This appeal follows.

2. <u>Evidence presented at fact-finding:</u>

Eddie Tennyson is the uncle of respondent Z.T. RP at 35. Z.T. started living with his uncle when he was two years old and Mr. Tennyson adopted Z.T. in 2008 when he was eight years old. RP at 35. Mr. Tennyson's fiancée—Julie Roberts—has lived with Mr. Tennyson and Z.T. since 2006. RP at 36. Mr. Tennyson and Ms. Roberts act as parental figures to Z.T. and he refers to them as "mom and dad." RP at 37, 72.

Ms. Roberts reported to police that Z.T. had not returned to their house—located in Vancouver, Washington—on February 10, 2015, after

he failed to return to the house after school. RP at 39, 73. Although he did not return on February 10, Z.T. went to school on February 11 and Mr. Tennyson was notified by the school that he was in attendance. RP at 39. Mr. Tennyson and Ms. Roberts picked Z.T. up from school and took him back to their residence. RP at 39. Mr. Tennyson and Ms. Roberts stated that Z.T. had a nonchalant, "I don't care" attitude about leaving school and not coming home. RP at 40, 74.

After administering a drug test, which was negative, they returned to their home. RP at 41. Z.T. had a school homework assignment that was overdue, but Z.T. said that he was done working and that he was not going to complete the project and closed the computer that he was using. RP at 74. Ms. Roberts told Z.T. to finish his homework and Z.T. began to yell at her. RP at 74. Ms. Roberts hit Z.T. on the right side of his head with her open palm. RP at 75. Z.T. began to yell at Ms. Roberts and grabbed her arms and tried to push her out of the way. RP at 77. Ms. Roberts and Z.T. struggled and he grabbed her shoulders and then pushed her over the living room couch. RP at 77-78.

Mr. Tennyson heard the altercation and came into the room and pushed Ms. Roberts out of the way. RP at 78. Z.T. kicked Mr. Tennyson in the leg, and also hit him on the left side of his face and kicked him in his right knee. RP at 45-50. Z.T. then went to his room and Mr. Tennyson

called the police. RP at 52, 80. After calling law enforcement, Mr. Tennyson went to Z.T.'s room and asked "are we good?" RP at 52-53. Z.T. said in response "I'm going to f—king kill you. I'm going to f—king kill you guys." RP at 53-54. Mr. Tennyson told Ms. Roberts about what he had said. Both testified that they took the statement seriously because of Z.T.'s unpredictable behavior and the calm way in which Z.T. had made the statement. RP at 82.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF FELONY HARASSMENT BECAUSE THE STATE COURT DID NOT FIND THAT Z.T. MADE A "TRUE THREAT," AN ESSENTIAL ELEMENT REQUIRED FOR CONVICTION OF FELONY HARASSMENT.

a. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel,* 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

b. To obtain a conviction for felony harassment, the prosecution must allege and prove the element of a "true threat."

The due process clause of the Fourteenth Amendment requires the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In this case, Z.T. was charged and convicted of felony harassment. RCW 9A.46.020(2)(b),(2)(b)(ii). CP 5. The statute provides that a person is guilty of harassment if "[w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person," and "[t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1); CP 5. To "threaten" is "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). The crime is elevated to a felony when the threat is to kill, but in such cases, conviction requires proof "that the person threatened was placed in reasonable fear that the threat to *kill* would be carried out." *State v. Mills*, 154 Wn.2d 1, 10, 109 P.3d 415 (2005) (citing *State v. C.G.,* 150 Wn.2d 604, 612, 80 P.3d 594 (2003)). It is not sufficient to prove that the person threatened reasonably feared that bodily harm would be

inflicted. *C.G., at* 609-610.

There is an additional, nonstatutory element: to avoid a First Amendment violation, the State must prove the threat constitutes a "true threat" rather than idle chat. *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001). A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *State v. Johnston*, 156 Wn.2d 355, 360-361, 127 P.3d 707 (2006).

In reviewing the sufficiency of the evidence to uphold the conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In this case, the trial court did not explicitly find that the context or circumstances under which Z.T.'s statement was made would have lead a **reasonable person** to foresee that the statement would be interpreted as a serious expression of an intention to inflict damage. *Johnston,* 156 Wn.2d at 360-361; Findings of Fact and Conclusions of Law, CP 53-57, 59. Nor did the court conclude that Z.T.'s statement constituted a "true threat." CP 59. Here, the alleged threat was told to his uncle after the physical incident was

over. The testimony is clear that the behavior was out of character for him. The testimony that Mr. Tennyson and Ms. Roberts took that seriously was only because of the belief that Z.T. was "unpredictable," and that he expressed rage toward them during the incident. Given the prosecution's burden to prove a true threat, the absence of findings specifically addressing whether a "reasonable person" would feel threatened establishes that the State failed to sustain its burden. *State v. Armenta*, 134 Wn.2d 1,14, 948 P.2d 1280 (1997); *State v. Bryd*, 110 Wn.App. 259, 265, 39 P.3d 1010 (2002).

Because the Court did not find that the State established a a true threat, Z.T.'s convictions for harassment must be reversed and the case dismissed with prejudice.

E. CONCLUSION

Based on the above, Z.T. respectfully requests this Court to reverse and dismiss his convictions for harassment—threat to kill.

DATED: September 1, 2015.

Respectfully submitted,
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