IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. D.L.B., Appellant.	No. 41767-7-II UNPUBLISHED OPINION

Van Deren, J.—DLB[1] appeals his juvenile court adjudication and disposition for felony harassment. He argues that the State failed to present sufficient evidence that his mother reasonably feared that he would carry out a threat to kill her and that his threat did not constitute a "true threat."[2] Brief of Appellant at 1. We agree and so reverse and dismiss DLB's adjudication.[3]

[1] Under RAP 3.4, this court changes the title of the case to the juvenile's initials to protect the juvenile's interests in confidentiality.

[2] DLB also argues that the State failed to allege in its information that his conduct constituted a "true threat" and that the record does not support his 52 week manifest injustice disposition. In light of our disposition of his sufficiency argument, we need not address these arguments.

[3] A commissioner of this court heard DLB's appeal on an accelerated basis under RAP 18.13 and referred it to a panel of judges.

FACTS

On November 19, 2010, Jacqueline Wojcik tried to convince her 17 year old son, DLB, to come with her to a counseling appointment at Behavioral Health Resources (BHR), but he said he would not go with her. DLB asked Wojcik if he could take his all-terrain vehicle (quad) out for a ride while she was gone, but she refused to allow him to do so. DLB became angry as he searched for, but could not find, his quad helmet. He argued with Wojcik, eventually telling her that she had "better shut [her] fucking mouth." Report of Proceedings (RP) at 6. Thereafter, according to Wojcik, "[H]e said he was going to get a gun out of [his] room and shoot me." RP at 6.

Wojcik did not respond to his threat. Instead, she sat in her rocking chair for awhile before asking him once more if he would go to the counseling appointment with her. DLB refused again, and Wojcik went to the mental health counselor by herself. She told the counselor what had happened, prompting the counselor to contact the sheriff's office, and resulting in DLB's arrest for harassment.

The State charged DLB with felony harassment under RCW 9A.46.020(1)(a)(i) and (2)(b)[4] for threatening to kill Wojcik. Wojcik testified as described above. During direct examination, she stated that she was not worried about DLB acting on his threat because "most of the time he says stuff and he don't [sic] carry through with it" and that "most of the time what he says is just talk." RP at 6. When asked if she knew whether DLB had access to a weapon, she

[4] The 62nd legislature, during its 2011 regular session, passed amendments to RCW 9A.46.020. The 2011 amended statute's effective date is July 22, 2011. Any changes to the statute are not pertinent to this opinion. *See* Engrossed Second Substitute H.B. 1206, 62nd Leg., Reg. Sess. (Wash. 2011); Laws of 2011, ch. 64, § 1.

answered that he did not and that there was no weapon on the property. The State asked her if DLB had exhibited any other behavior that caused her concern during the conversation in which he threatened her, and she answered that she was not sure.

During cross-examination, when asked whether it was fair to say that she did not report the incident as a threat but rather information that she provided her counselor during the counseling session, Wojcik answered affirmatively, stating, "I thought maybe if I told her it would help . . . maybe she could help with getting him some help, you know, for mental health . . . more than what he was getting." RP at 9.

During redirect examination, when asked whether she thought DLB would "get un-upset" about the quad helmet and would not follow through with his threat, Wojcik replied, "It was just the fact that he had said that . . . made me upset, you know. I just . . . I thought it was, you know, not good to be saying, you know, [w]hether you follow through or not." RP at 11.

After counsel completed their questioning, the juvenile court first asked Wojcik whether the statement DLB had made frightened her. When she answered that it had, he then asked, "Were you concerned that even if there weren't a gun in the house that he might go find a gun and carry out his threat?" RP at 12. Wojcik answered, "I didn't feel it would be that day but maybe someday, you know." RP at 12.

The State then called the arresting officer, Grays Harbor Deputy Sheriff Mike Osgood, who testified that DLB appeared agitated and smelled like alcohol when arrested. Osgood testified that DLB had said that he did not have a gun at the residence but that he could get one if he wanted.

The juvenile court found DLB guilty of felony harassment, finding that "Wojcik was

frightened by what [DLB] said and was afraid he might follow through with the threat in the future although she didn't believe [DLB] had access to a gun at the time." Clerk's Papers at 19. After a later disposition hearing, it imposed a manifest injustice disposition of 52 weeks' commitment to Juvenile Rehabilitation Administration.

ANALYSIS

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). We consider circumstantial evidence as reliable as direct evidence. *Turner*, 103 Wn. App. at 520. And we do not review credibility issues; as such determinations are the sole prerogative of the trier of fact. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004).

In order to convict a defendant of felony harassment based on a threat to kill, the State must prove beyond a reasonable doubt not just that the defendant knowingly threatened to kill, but also that the victim reasonably feared that the threat made is the one that the defendant would carry out. *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003). In *C.G.*, our Supreme Court reversed an adjudication for felony harassment when a student told her vice-principal that "I'll kill you, Mr. Haney, I'll kill you," but when the State did not present evidence that Haney was placed in reasonable fear that she would kill him. 150 Wn.2d at 607, 610 (internal quotation marks omitted). Moreover, because of First Amendment[5] implications, a conviction for felony

harassment based upon a threat to kill requires that the State prove also that the threat made was a "true threat." *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). "'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 to inflict bodily harm or to take a life.'" *Kilburn*, 151 Wn.2d at 43 (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001)). To determine whether the defendant has made a "true threat," we conduct an independent review of the constitutionally critical facts. *Kilburn*, 151 Wn.2d at 54.

The State's evidence is insufficient as to both requirements, i.e, the State did not present any evidence that Wojcik reasonably feared that DLB would carry out his threat to shoot her and the State failed to present sufficient evidence that DLB uttered at "true threat." Here, Wojcik testified repeatedly that she was not worried and that she did not believe DLB had access to a weapon. She testified further that the reason she reported the incident was to get him help for his mental health issues rather than out of fear that he would follow through with his threat. While she eventually acknowledged that DLB's threat had frightened her and that maybe someday he might get a gun, she did not testify that she was afraid he was going to follow through with his current threat to go to his room, get a gun, and shoot her, as *C.G.* requires. 150 Wn.2d at 609. Finally, her reaction to his threat precludes a reasonable inference that the threat to shoot her caused her to fear for her life. When he told her he was going to get a gun from his room, she remained seated in her rocking chair. Those actions were not consistent with a fear that DLB was going to follow through with his threat. The juvenile court's finding as to Wojcik being

[5] U.S. Const. amend. I.

frightened is not sufficient to establish that Wojcik reasonably feared that DLB would carry out his threat to shoot her.

Furthermore, the State failed to present sufficient evidence that DLB uttered a "true threat" because it did not establish that a reasonable person, in DLB's circumstances. would have foreseen that Wojcik would take his threat as a serious expression of his intent to shoot her. He and she both knew there was no weapon in the house and she testified that he would often say things when he was upset but would not follow through with his statements.

The State failed to present sufficient evidence that DLB's threat to shoot Wojcik placed her in reasonable fear that he would carry out that threat and failed to establish that the threat constituted a "true threat." Accordingly, we reverse and dismiss DLB's adjudication for felony harassment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Penoyar, C.J.

Worswick, J.