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

STATE OF WASHINGTON, Respondent, v. KEITH EDWARD BERRY, Appellant. _____ In re the Personal Restraint of: KEITH EDWARD BERRY, Petitioner.	)	No. 30742-5-III UNPUBLISHED OPINION

Kulik, J. — Jessica Reed and Irene Reed had restraining orders against Keith Edward Berry. Mr. Berry went to the women's home, tried to speak to them, and caused property damage to a car. In addition, Mr. Berry left threatening voicemails for both women. After a bench trial, Mr. Berry was convicted of two counts of harassment and four counts of domestic violence court order violations. Mr. Berry appeals. He assigns error to the trial court's convictions of harassment of Jessica[1] and harassment of Irene,

contending that his threat to Jessica was not a true threat and that the State failed to establish that the threat against Irene occurred during the charging period. Mr. Berry also filed a personal restraint petition (PRP) that has been consolidated with this appeal.

We affirm the convictions and dismiss the personal restraint petition.

FACTS

On July 13, 2010, Jessica called 911 to report that Mr. Berry was at her mother's home. Both Jessica and her mother, Irene, were at the home and both women had valid restraining orders against Mr. Berry. Mr. Berry knew that the restraining orders were in effect.

Mr. Berry approached the front door. Irene opened the door and spoke to Mr. Berry. After Mr. Berry spoke to Irene, he walked over to the side of the house, picked up a rock, and smashed the window of Jessica's car.

When police arrived, Jessica reported that Mr. Berry left threatening messages on her telephone. On July 20, the women allowed the police to record the voicemail messages they received earlier that month.

Pierce County charged Mr. Berry with two counts of harassment, one count of

[1] We refer to the women by their first names for ease of reading. We mean no disrespect.

malicious mischief, and four counts of domestic violence court order violations. Upon Mr. Berry's request, the trial court allowed Mr. Berry to represent himself.

During the period before trial, the trial court granted continuances for trial preparation, for courtroom unavailability, and for unavailability of the prosecutor. Mr. Berry objected to these continuances.

On December 28, Mr. Berry moved to suppress the recording of the voicemail messages under ER 901. He claimed that he could not authenticate the recording because he did not have a chance to listen to the recording in jail. The trial court ordered that the State retrieve the voicemail recording from evidence and to deliver a copy to Mr. Berry. Also, the trial court reserved the ER 901 issue for trial. The State delivered a compact disk to Mr. Berry at the jail.

Mr. Berry's trial began on February 3, 2011. Mr. Berry appeared pro se. Jessica testified she met Mr. Berry six years ago and the two were in a romantic relationship until June or July 2010. Jessica testified that Mr. Berry left a threatening voicemail for her between June and July 2010. The court heard the voicemail message. In the message, Mr. Berry told Jessica:

> Why can't you tell me goodbye? It is because you are f[ ]ing somebody else. Can you just tell me goodbye. I can accept that, you know, but you're

> sitting up there. You are not answering your phone, you know. I already know you are f[ ]ing somebody else. You know what I'm saying? . . . . I already knew. I already knew what you [were] doing, dude. You know what I'm saying?
>
> Just tell me the f[ ]ing goodbye and shit. If you tell me goodbye, I can accept that. You know what I'm saying? But you [sic] not trying to tell me goodbye. You trying to play little games . . . . You know what I'm saying? You are going to get hurt. That is the only thing. *You are going to get hurt in the long run*. You know what I'm saying?
>
> Come on, man. Just tell me the f[ ]ing goodbye. If that's what it is, then that's what it is. You know what I'm saying? Don't—don't try to play me and play some other n[ ]. Come on, man. *You are going to get hurt, Jessica. I'm telling you, you are going to get hurt*.

Report of Proceedings at 134-35 (emphasis added).

Jessica stated that Mr. Berry had been violent with her before and that there had been multiple times where she thought Mr. Berry was going to kill her. Jessica described being choked by Mr. Berry, getting punched in the mouth, and being threatened by Mr. Berry that he was going to kill her. Mr. Berry admitted to pleading guilty to domestic violence harassment against Jessica in April 2008.

The trial court found that Mr. Berry's tone in the voicemail was hostile and aggressive, and that the words or conduct of Mr. Berry placed Jessica in reasonable fear that the threat would be carried out.

The trial court also heard the voicemail message left on Irene's telephone. In the message, Mr. Berry said, "'That bitch would be laying in the motherf[ ]ing grave wit [sic]

you.'" Clerk's Papers (CP) at 27. The State could not present testimony of Irene because she died before trial. But her daughter, Jessica, testified that she was not sure when the voicemail was left for Irene but thought it was July 13. The trial court found that between June 1 and July 13, Mr. Berry left a voicemail message on Irene's telephone. The court inferred that Mr. Berry was telling Irene that he was going to kill or harm her and/or her daughter.

The court found Mr. Berry guilty of six of the seven counts. Mr. Berry assigns error to both harassment convictions. Mr. Berry also filed a personal restraint petition that has been consolidated with this appeal.

ANALYSIS

Sufficient Evidence of a "True Threat." "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In making the challenge, the defendant admits to the truth of the State's evidence and all reasonably drawn inferences. *Id*. The reviewing court will defer to the fact finder on issues of conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Unchallenged findings are verities on appeal. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

When reviewing crucial facts that involve the legal determination of whether speech is unprotected under the First Amendment, independent review of the record is required to assure that the judgment does not intrude on the field of free expression. *State v. Kilburn*, 151 Wn.2d 36, 50, 84 P.3d 1215 (2004) (quoting *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 505, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).

To convict Mr. Berry of the crime of felony harassment, the State needed to prove that:

> (1) That on or about June 1, 2010 and July 13, 2010, the defendant unlawfully and feloniously, without lawful authority, knowingly threatened to cause bodily injury immediately or in the future to Jessica Reed or to any other person;
>
> (2) By words or conduct placed the person threatened in reasonable fear that the threat will be carried out;
>
> (3) The defendant has been previously convicted in this or any other state of any crime of harassment of the same victim or of a family member of the victim's family or household or any person specifically named in the no-contact or no-harassment order;

(4) That this act occurred in the State of Washington.

See CP at 59-62; *see also* RCW 9A.46.020.

"'The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech."'" *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010) (quoting *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)). RCW 9A.46.020 criminalizes pure speech and therefore "'must be interpreted with the commands of the First Amendment clearly in mind.'" *Kilburn*, 151 Wn.2d at 41 (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001)).

The First Amendment does not extend to unprotected speech. *Schaler*, 169 Wn.2d at 283. "True threats" are unprotected speech. *Kilburn*, 151 Wn.2d at 43. A statement is a "true threat" if 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 intention to inflict bodily harm upon or to take the life'" of another person. *Id*. (internal quotation marks omitted) (quoting *Williams*, 144 Wn.2d at 208-09). The threat must be serious, not just a statement made in jest or a political argument. *Kilburn*, 151

Wn.2d at 43. The objective standard for a true threat is judged by focusing on the speaker. *Id*. at 44. The speaker does not need to intend to carry out the threat. *Id*. at 48.

Mr. Berry contends that the statement he made to Jessica that she was going to get hurt was not a true threat when taken in context with the rest of the voicemail message. In applying the test for true threat, the question becomes whether there is sufficient evidence that a reasonable person in Mr. Berry's position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death. *See id*.

In reviewing the critical facts, the State presented sufficient evidence to prove that Mr. Berry communicated a "true threat" to cause bodily harm to Jessica. Between June 1 and July 13, Mr. Berry left a message for Jessica that she was going to get hurt. Mr. Berry also left another message on Irene's telephone that threatened both Jessica and Irene. Mr. Berry stated, "'[T]hat bitch would be laying in the motherf[ ]ing grave wit [sic] you." CP at 27. Mr. Berry's tone in the voicemails was hostile and aggressive in nature.

In addition to these statements, Mr. Berry acted violently toward Jessica in the past. Mr. Berry admitted to pleading guilty to domestic violence harassment in April 2008 against Jessica. Also, Jessica testified that Mr. Berry threatened to kill her in the

past and committed violent acts against her, including choking and punching her. The court found Jessica credible. A reasonable person in Mr. Berry's position, knowing of his violent history with Jessica, would have been aware that Jessica would have taken these statements as true threats.

The trial court could find beyond a reasonable doubt that Mr. Berry made a true threat to cause bodily injury against Jessica and that the voicemails placed Jessica in reasonable fear that the threat of bodily harm would be carried out. Mr. Berry does not dispute the remaining findings regarding his harassment of Jessica. We affirm the trial court's conviction of Mr. Berry for felony harassment of Jessica.

Sufficient Evidence of Harassment During the Period Charged. Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987).

In his opening brief and in his statement of additional grounds, Mr. Berry contends that the State did not present sufficient evidence to prove the voicemail message on Irene's telephone was left during the charging period. Therefore, Mr. Berry alleges the State could not prove that he harassed Jessica or Irene during the charging period.

As evidence of the harassment, the State offered two voicemail messages left by Mr. Berry. Mr. Berry left one voicemail on Jessica's cell phone and the other on Irene's

home telephone. Jessica testified that both voicemail messages were left between June 1, 2010, and the first week of July 2010. Jessica also testified that Irene received her message later in the same day that Jessica received a voicemail message. Jessica also testified that both voicemail messages were left close to the date where Mr. Berry broke her car window with a rock. The police detective testified that the incident happened on July 13 and that Jessica tried to play the messages that night. The trial court found Jessica and the police detectives credible.

Drawing all reasonable inferences in favor of the State, the trial court could conclude that Mr. Berry left the voicemail message for Irene between June 1 and July 13, 2010. Sufficient evidence existed to find that Mr. Berry harassed Irene during the period charged. The trial court's conviction of Mr. Berry for felony harassment of Irene is not erroneous.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Berry filed a statement of additional grounds for review. He contends that he received an excessive sentence because the trial court sentenced him above the standard range. His contention fails. The standard range for Mr. Berry's four counts of domestic violence court order violation was 51 to 60 months. The trial court sentenced Mr. Berry to 60 months for each count. The standard range for Mr. Berry's two felony harassment

charges was 33 to 43 months. The court sentenced Mr. Berry to 43 months. Thus, the trial court imposed all sentences within the standard range. The trial court did not impose an excessive sentence on Mr. Berry.

CONSOLIDATED PRP

To obtain relief in a personal restraint petition, the petitioner must show actual and substantial prejudice resulting from alleged constitutional errors or, for alleged nonconstitutional errors, a fundamental miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812-13, 792 P.2d 506 (1990). The burden is on the petitioner to show that "more likely than not he was prejudiced by the error." *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 826, 650 P.2d 1103 (1982).

The petition must be supported by facts, not merely conclusory allegations. *Cook*, 114 Wn.2d at 813-14. If the petitioner fails to provide sufficient evidence to support his challenge, the petition must be dismissed. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). For allegations "based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Allegation that Jessica Committed Perjury. Credibility determinations are for the

trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Mr. Berry challenges Jessica's credibility in his PRP. The trial court found Jessica credible. We defer to the trier of fact for determination of credibility and will not review this issue.

Offender Score Calculation. The trial court's calculation of an offender score is reviewed de novo. *State v. Soper*, 135 Wn. App. 89, 104, 143 P.3d 335 (2006).

Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, "whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a).

Mr. Berry contends that the trial court miscalculated his offender score. His contention fails. First, the trial court did not find that any of Mr. Berry's current felony offenses counted as the same criminal conduct. Therefore, in calculating the score for any one of the current felony offenses under RCW 9.94A.589(1)(a), the remaining

felonies added 1 point each, totaling 5 points. Additionally, Mr. Berry had 2 prior felony convictions in the state of Washington that counted as 1 point each toward his offender score. Mr. Berry's offender score totaled 7 points. The trial court used this same offender score. Mr. Berry fails to show an error in calculation. His contention is without merit.

Right to a Speedy Trial. "[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). However, claims involving constitutional rights are review de novo. *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). We apply de novo review to Mr. Berry's contention that the trial court violated his constitutional right to a speedy trial.

Under similar provisions found in the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, persons accused in criminal prosecutions have the right to a speedy public trial. Whether a Sixth Amendment speedy trial violation occurred depends on "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant." *State v. Wernick*, 40 Wn. App. 266, 272, 698 P.2d 573 (1985). Prejudice to the defendant can occur from oppressive pretrial incarceration, anxiety and concern of the

accused, and the possible impairment of the defense. *Id.*

Length of the delay is a triggering factor. *Barker v. Wingo*, 407 U.S. 514, 530-31, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). "[O]nce the defendant demonstrates a delay is presumptively prejudicial, that showing triggers the remainder of the *Barker* inquiry, which then examines the nature of the delay to determine if a constitutional violation occurred." *Iniguez*, 167 Wn.2d at 283. "A delay of approximately 4 months, standing alone, is not long enough to constitute a denial of a speedy trial." *State v. Agtuca*, 12 Wn. App. 402, 405, 529 P.2d 1159 (1974).

Reasons for a delay are weighed differently. *Iniguez*, 167 Wn.2d at 284 (quoting *Doggett v. United States*, 505 U.S. 647, 657, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992)). Deliberate delays by the State to frustrate the defense are weighed heavily against the State. *Id*. However, "[i]f the State is merely negligent or the delay is due to overcrowded courts, the delay will still be weighed against the State, though to a lesser extent." *Id.*

Mr. Berry contends that the trial court violated his constitutionally guaranteed right to a speedy trial by granting continuances for improper reasons. Mr. Berry refers to the trial court's delays for court congestion, lack of diligent preparation, and failure to obtain witnesses.

As a threshold matter, Mr. Berry does not show that the length of the delay was

presumptively prejudicial. The State brought Mr. Berry to trial a little over four months after the information was filed. This length of time alone is not enough to trigger the *Barker* factors. Even if we were to enter into a *Barker* analysis, Mr. Berry's argument fails. He does not show that the trial court granted the continuances to deliberately delay his trial. Of even more importance, Mr. Berry fails to show how he is prejudiced by the delay. Without a showing of prejudice, Mr. Berry fails to demonstrate that the trial court violated his Sixth Amendment right to a speedy trial. His request for relief is denied.

Inability to Access Evidence. "[A]rticle I, section 22 affords a pretrial detainee who has exercised his constitutional right to represent himself a right of reasonable access to state-provided resources that will enable him to prepare a meaningful pro se defense." *State v. Silva*, 107 Wn. App. 605, 622, 27 P.3d 663 (2001).

Under ER 901(b)(1), evidence can be authenticated prior to admission by testimony of a witness with knowledge that the evidence is what it is claimed to be. ER 901(b)(5) allows for voice identification to authenticate evidence by a witness familiar with the voice and connecting it with the speaker. *State v. Williams*, 136 Wn. App. 486, 500 n.7, 150 P.3d 111 (2007).

Mr. Berry's inability to access the evidence did not result in a constitutional error because the State did not deny Mr. Berry access to the evidence or the resources needed

to present a defense. To the contrary, the State provided a copy of the recording to Mr. Berry in jail.

Although he could not access the recording, Mr. Berry does not show that he was denied the opportunity to present a defense but, rather, that he chose not to review the evidence before him. Mr. Berry was aware that he could not access the compact disk and chose not to notify the trial court on either of the two occasions when he appeared in court prior to trial. Instead, Mr. Berry waited until the State presented the recording as evidence at trial. Even after the trial court admitted the recording, Mr. Berry did not ask the court to provide an opportunity for him to review the recordings. Also, he did not inform the trial court that his defense would suffer as a result of not hearing the voicemail recording prior to questioning witnesses. Nor did he object to the substance of the recording.

We do not agree with Mr. Berry that his inability to authenticate the recordings resulted in actual prejudice. Mr. Berry fails to show that he could have proved that the recordings were not what Jessica claimed them to be. Jessica, who had firsthand knowledge of the voicemail messages, testified that the recordings played during trial were the same voicemails she played for detectives. She also stated that she recognized Mr. Berry's voice in the recordings.

Mr. Berry does not show that he was prejudiced by a constitutional error based on a failure to present a meaningful defense. Likewise, if his challenge to the admission of the recording is considered a nonconstitutional error, Mr. Berry fails to show a fundamental defect resulting in a complete miscarriage of justice.

Denial of Subpoena. Discovery rulings are reviewed for an abuse of discretion. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 629, 818 P.2d 1056 (1991).

In Washington, subpoenas in criminal proceedings are issued in the same manner as subpoenas in civil actions. CrR 4.8. Subpoenas shall "command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified." CR 45(a)(1)(C).

Mr. Berry filed a motion to subpoena Jessica's cell phone records for the months of June and July. During the motion hearing on the first day of trial, a Thursday, the trial court recognized that Mr. Berry had not directed the subpoena to a particular person or a particular custodian of records. Mr. Berry admitted that he did not have basic information, such as Jessica's cell phone carrier. Because the court lacked the necessary

information, the court indicated that it could not grant the motion for a subpoena because Mr. Berry had not presented an appropriate subpoena. The court also indicated that it would reconsider its decision if Mr. Berry could present a proper subpoena.

Mr. Berry learned of Jessica's cell phone provider during cross-examination on Friday morning. On the following Monday, Mr. Berry asked for a trial recess so he could obtain Jessica's telephone records. Mr. Berry told the court that the subpoena would take him a few days to get ready. The trial court denied the continuance based on its doubts that Mr. Berry would be able to properly prepare the subpoena in the short amount of time requested and that, at most, the records would show impeachment testimony on a collateral matter. The trial court's decision did not result in a fundamental miscarriage of justice.

Moreover, Mr. Berry fails to show how he was prejudiced by the trial court's decision not to grant his request for a continuance. We decline to grant relief on this issue.

We affirm the convictions and dismiss the personal restraint petition.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

_____ _____
Korsmo, C.J. Siddoway, J.