No. 70398-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOEL C. HOLMES,

Appellant.

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

BRIEF OF APPELLANT

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2. In the absence of sufficient evidence to establish that Mr. Holmes communicated a "true threat," his convictions for intimidating a judge by a threat to kill and harassment by a threat to kill violated his constitutional right to free speech.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The due process provisions of the Fourteenth Amendment and of Article I, section 3 of the Washington Constitution require the State to prove beyond a reasonable doubt every essential element of the crime charged. As charged, the offense of intimidating a judge required proof that Mr. Holmes directed a threat to a judge "because of a ruling or decision of the judge." In the absence of evidence to establish beyond a reasonable doubt that Mr. Holmes's purported threat to a judge was because of a ruling or decision by that judge, did the State produce sufficient evidence to support his conviction for intimidating a judge?

2. To obtain a conviction for harassment by a threat to kill and intimidating a judge by a threat to kill, the constitutional right to free speech guaranteed by the First Amendment requires the State to prove beyond a reasonable doubt that the threat was a "true threat." Here, in the absence of evidence to prove beyond a reasonable doubt that a reasonable person in Mr. Holmes's position would foresee his statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another, did the State produce sufficient evidence to support his convictions for harassment and intimidating a judge?

C. STATEMENT OF THE CASE

In 2006, Joel C. Holmes was convicted of four counts of telephone harassment following a jury trial presided over by Judge Julie Spector. 5/9/13 RP 75; Ex. 7. Evidence at that trial established that, in 1986, following his dismissal from the university, Mr. Holmes placed a series of telephone calls to a University of Washington vice provost and stated he would kill him, but he never acted on those statements. Ex. 8 at 3-4. Twelve years later, in 1998, he placed another series of telephone calls to the vice provost as well as to the former university president in which he referred to his dismissal and stated he would kill the vice provost, the former university president, and then-president Bill Clinton. Ex. 8 at 2-3. Again, he never acted on those statements. Eight years later, in 2004, he

again placed a series of telephone calls to the vice provost, the retired president, and two other university administrators, in which he referred to his dismissal and stated he would kill them. Ex. 5, 6, 8 at 3-4. Again, although the vice provost testified he saw Mr. Holmes across the street from his house in 1996, Mr. Holmes never acted or attempted to act on his verbal statements. 5/9/13 RP 80, 86, 115, 125, 165; Ex. 8 at 4.

Following his convictions, Mr. Holmes rigorously pursued every avenue of appeal and he occasionally went to Judge Spector's courtroom for assistance with filing his appellate pleadings and related papers. 5/9/13 RP 105-06. In 2011, Mr. Holmes placed a series of telephone calls to Judge Spector's governmental courtroom telephone, none of which were considered threatening. 5/9/13 RP 40, 56, 69; CP 4.

On November 18, 2012, Mr. Holmes placed a brief telephone call to 911.

> DISPATCHER: 911. What are you reporting?
>
> MR. HOLMES: I'm going to kill King County Prosecutor Dan Satterberg and Shoreline District Court Judge Doug ... I'm going to assassinate Dan Satterberg and Shoreline District Court Judge Douglas J. ... and ... Shoreline District prosecutor. I'm going to assassinate Dan Satterberg and Doug ... Doug and Judge Julie Spector and Judge Douglas J. Smith ... (dial tone).

Ex. 1.

Based on the 911 call, Mr. Holmes was charged with intimidating a judge by a threat to kill Judge Julie Spector, and felony harassment, also by a threat to kill Judge Spector. CP 1-2.

At trial, Judge Spector testified that she was aware that Mr. Holmes never acted on his purported threats. 5/9/13 RP 115, 125. Nonetheless, she was "shocked," "terrified," and "alarmed" because she remembered that Mr. Holmes was seen across from the vice provost's house in 1996, even though her personal address was not public information. 5/9/13 RP 80, 86, 135. Judge Spector also testified that, several days after the 911 call, she received three "nonsensical rambling" e-mails sent by Mr. Holmes to her governmental courtroom e-mail address. 5/9/13 RP 82-83. The e-mails concerned her because he contacted her courtroom directly, which she characterized as "no holds barred." 5/9/13 RP 83-84.

The State introduced a recording of a telephone call Mr. Holmes placed to the Washington Supreme Court while the instant charges were pending, in which he inquired about a motion he filed for public funds to pay a filing fee in a civil suit. Ex. 17. When the case manager recommended that he wait for the Commissioner's ruling on his motion, Mr. Holmes became upset, compared Washington to a "third world dictatorship," and stated "Judge Spector won't be the last judge that I'm

put on trial for threatening" and "I'm going to kill Barbara Madsen and the rest of the state supreme ... how do you like that?" Ex. 17.

Mr. Holmes was convicted of intimidating a judge and harassment as charged. CP 237, 238.

D. ARGUMENT

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, 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, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

1. Insufficient evidence was produced to establish Mr. Holmes directed a threat to a judge "because of a ruling or decision of the judge," an essential element of the offense of intimidating a judge.

RCW 9A.72.160 provides in relevant part:

> (1) A person is guilty of intimidating a judge if a person directs a threat to a judge because of a ruling or decision of the judge in any official proceedings....

The intimidating a judge statute criminalizes purported threats to a judge "only if used to attempt to influence a judge's ruling or in retaliation for a past ruling." *State v. Knowles*, 91 Wn. App. 367, 374, 957 P.2d 797 (1998).

Here, the State proceeded under the assumption that some of Mr. Holmes's invective was directed at Judge Spector because a ruling or decision she made when she presided over his trial in 2006. *See, e.g.*, Ex. 7 (Judgment and Sentence Felony). However, given the scattershot nature of the purported threats, the very passing reference to Judge Spector, the lack of any reference to the 2006 trial, much less a specific ruling or decision, and Mr. Holmes's known decades-long history of placing multiple telephone calls to express his frustration with the government and the legal system, without taking any action, the State's assumption is unsupported by the evidence. Significantly, Mr. Holmes did not refer to the 2006 convictions in the 911 call and he clearly understood that the

verdicts were rendered by a jury, and not by Judge Spector. 5/9/13 RP 177-78.

The State introduced evidence of Mr. Holmes's multiple appeals and argued that the appeals demonstrated Mr. Holmes was "obsessed" with Judge Spector. 5/13/13 RP 65-66; Ex. 8-16. This argument was antithetical to the state constitutional right to appeal, which guarantees a criminal defendant the "right to appeal in all cases." Wash. Const. Art. I, section 22.

The State also introduced evidence of three e-mails that Mr. Holmes forwarded to Judge Spector several days after his 911 call. In the e-mails, Mr. Holmes complained about the quality of his legal representation by the Federal Public Defender's Office and the Washington Appellate Project, renounced his United States citizenship, seceded from the African-American race, stated he was going to commit suicide, disparaged Washington State and federal political policies, and conditionally stated he would kill the Washington Supreme Court Commissioner, the Chief Justice, the Washington governor-elect, President Obama, and "the rest of the attorneys/judiciary." Ex. 3. However, none of the e-mails mentioned Judge Spector or referred to any ruling or decision that she made in his 2006 case.

In every published case interpreting the statute, the defendant's purported threat specifically referred to a judicial ruling or decision. In *State v. Brown*, after the defendant was convicted for driving under the influence, the defendant told a third party that the sentencing judge had been hard on him, the judge caused "this mess," and that he could see the judge and the judge's family from his front porch and had thought about shooting them. 137 Wn. App. 587, 589-90, 154 P.3d 302 (2007). In *State v. Side*, after a judge found the defendant in contempt, the defendant told a third party that the judge "better not mess with him" or it would be "gun locker time," he would "have to take people out," and there "would be one less judge in the world to be making decisions like this." 105 Wn. App. 787, 789, 21 P.3d 321 (2001). In *State v. Hansen*, following the defendant's release from custody, he contacted attorneys to bring a civil action against the sentencing judge, the prosecuting attorney, and his defense attorney, and he told one attorney who declined to take his case, "what am I going to do ... I am going to get a gun and blow them all away, the prosecutor, the judge and the public defender." 122 Wn.2d 712, 714-15, 862 P.2d 127 (1993). In *Knowles*, the defendant appeared before three judges in a short period of time and made statements to each judge that he would file liens against their property if he was not released from custody or if they did not release his property, and the judges would be subject to

civil sanctions if they did not comply with his demands. 91 Wn. App. at 370. Finally, in *State v. Kepiro*, after a judge issued an anti-harassment order against the defendant, the defendant complained to the judge's bailiff that the judge was unfair, he sent the judge several verbally abusive or implicitly threatening letters, and he told an investigating officer that the judge had not treated him fairly and had abused his rights. 61 Wn. App. 116, 117-19, 810 P.2d 19 (1991).

By contrast here, Mr. Holmes did not refer to the 2006 conviction in the 911 call, he never disputed a ruling or decision by Judge Spector, and he challenged his conviction through the legitimate appellate process. In the absence of actual, substantial evidence, rather than mere speculation or innuendo, that some of Mr. Holmes's invective was directed at Judge Spector because of a ruling or decision made by her, Mr. Holmes' conviction for intimidating a judge cannot stand.

2. Insufficient evidence was produced to establish Mr. Holmes communicated an unprotected "true threat," as required by the First Amendment to support his convictions for intimidating a judge by a threat to kill and harassment by a threat to kill.

a. The offenses of intimidating a judge by a threat to kill and of harassment by a threat to kill require proof of an unprotected "true threat."

The offenses of intimidating a judge by a threat to kill and harassment by a threat to kill criminalize "threats." RCW 9A.72.160;

RCW 9A.46.020. A threat is pure speech. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). The United States Constitution and the Washington Constitution guarantee freedom of speech. U.S. Const. amend. I; Wash. Const. art. 1, sec. 5; *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To comport with the constitutional right to free speech, a statute that criminalizes pure speech must be limited to unprotected speech only, such as "true threats," "fighting words," or words that produce a "clear and present danger." *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L.Ed.2d 1031 (1942); *Schenck v. United States*, 249 U.S 47, 52, 39 S. Ct. 247, 63 L.Ed.2d 470 (1919); *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). When a criminal statute implicates speech, the State must prove both the statutory elements of the offense and that the speech was unprotected by the First Amendment. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004).

Accordingly, the offenses of harassment by a threat to kill and of intimidating have been interpreted as limited to true threats to comport with the First Amendment. *Williams*, 144 Wn.2d at 207-08 (interpreting RCW 9A.46.020); *Brown*, 137 Wn. App. at 591-92 (interpreting RCW

9A.72.160); *cf. Knowles*, 91 Wn. App. at 374 ("true threat analysis not applied to defendant's statement that he would file liens on judges' property and the judges would be subject to civil or criminal sanction, because statement did not threatened judges' physical health or safety). Therefore, as charged here, the State was required to prove both the statutory elements of the offenses and that the threat was an unprotected "true threat."

b. The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. Holmes communicated a "true threat."

Where a challenge to the sufficiency of evidence implicates core First Amendment rights, the appellate court must conduct an independent review of the record to determine whether the speech in question was unprotected. *State v. Johnston*, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006). "It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings." *Kilburn*, 151 Wn.2d at 49. Rather, the "rule of independent review" requires an appellate court to "freshly examine 'crucial facts.'" – those facts that are intricately intermingled with the legal question. *Id.* at 50-51. "Also, the appellate court may review evidence ignored by a lower court in deciding the constitutional question."

Id. at 51; *accord State v. Locke*, 175 Wn. App. 779, 790, 307 P.3d 771 (2013).

Not all threats are "true threats." *Watts*, 394 U.S. at 707. In Washington, courts adhere to an objective speaker-based test for a "true threat."

> 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 intention to inflict bodily harm upon or to take the life of another. A true threat is a serious one, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

Kilburn, 151 Wn.2d at 43-44 (internal citations and quotations omitted); *accord Allen*, 176 Wn.2d at 626; *State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). The jury here was accordingly provided an instruction that limited the definition of "threat" to a "true threat."

> As used in these instructions, threat means to communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time or to cause bodily injury in the future to the person threatened or to any other person.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

CP 261 (Instruction No. 10).

In context and under the circumstances, a reasonable person in Mr. Holmes' position would not foresee that his statement would be interpreted as a serious express of intent to kill Judge Spector. His reference to Judge Spector was very fleeting. In fact, the 911 operator reported to police that the call purportedly threatened Mr. Satterberg and Judge Smith only, and did not mention Judge Spector. Ex. 1.

In *Locke*, over a four-minute period of time, the defendant sent three e-mails to Governor Gregoire's web site. 175 Wn. App, at 785. In the first e-mail, he identified his city as "Gregoiremustdie," and wrote that he hoped she would see a family member raped and murdered by a sexual predator, and that she had put the state "in the toilet." *Id.* In the second e-mail, the defendant again identified his city as "Gregoiremustdie," and wrote that she was a "fucking cunt," and she should be burned at the stake. *Id.* In the third e-mail, the defendant requested permission for his organization called "Gregoire Must DIe" to hold an event at the Governor's mansion, he wrote that the event would be "Gregoire's public execution," he invited the Governor to be the event "honoree," the event would last 15 minutes, the media would be invited, and the event would be attended by more than 150 people. *Id.* at 786. The court ruled that the first e-mail, albeit "crude and upsetting," was hyperbolic political speech "threatening personal consequences from the state's policies," rather than

a true threat. *Id.* at 791. The court further ruled that the second e-mail, standing alone, also was not a true threat. *Id.* However, the second e-mail and the third e-mail, considered together, did constitute a true threat because "[t]he menace of the communication was ... heightened by is specificity," and the defendant "had no preexisting relationship or communication with the Governor from which he might have an expectation that she would not take his statements seriously." *Id.* at 792-93. Here, by contrast, during the years following his 2006 conviction, Mr. Holmes sporadically contacted Judge Spector's staff, either in person or by telephone, and he had the reasonable expectation that she would know that he never acted on his purported threats.

As stated above, Mr. Holmes had a decades-long, well-known history of periodically placing a flurry of telephone calls purportedly threatening to kill various public figures to express his frustration with the government and the legal system. It was equally well-known that he never followed through on a single purported threat. Rather, his statements of frustration, however crude, were core hyperbolical speech protected by the First Amendment. *See Watts*, 394 U.S. at 708 ("The language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact."). Moreover, Mr. Holmes did not contact Judge Spector on any of her private, personal means of

communication. Rather, the purported threat here was made during a 911 call, and his other contacts with Judge Spector were either with her courtroom staff, on her governmental telephone, or to her governmental e-mail.

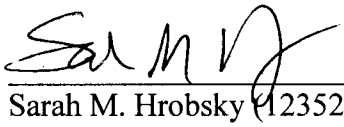
"Speech is protected, even though it may advocate action which is highly alarming to the target of the communication, unless it fits under the narrow category of a 'true threat." *Williams*, 144 Wn.2d at 209 (citations omitted). Here, in the absence of proof beyond a reasonable doubt that a reasonable person in Mr. Holmes's position would foresee that his statement would be taken as a serious expression of intent to kill Judge Spector, his statement was not a true threat and his convictions for intimidating a judge and harassment must be reversed. *See Kilburn*, 151 Wn.2d at 54.

E. CONCLUSION

The State failed to prove beyond a reasonable doubt that Mr. Holmes's purported threat to kill Judge Spector was in retaliation for a ruling or decision or that is was an unprotected true threat, rather than hyperbole. For the foregoing reasons, Mr. Holmes respectfully requests this Court reverse his convictions for intimidating a judge and harassment.

DATED this 11th day of December 2013

Respectfully submitted,



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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70398-6-I
v.	)	
	)	
JOEL HOLMES,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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