

65526-4

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ORIGINAL

NO. 65526-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDRE D. WELLS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE

1. Whether the Court should affirm the conviction of Andre Wells for felony telephone harassment against Lisa Easter when Wells left a voicemail message for Easter threatening to kick down her door, which constituted a true threat under the circumstances, and Wells had previously been convicted of felony harassment against Easter.

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

In April 2008, Defendant Andre Wells was convicted of committing felony harassment on Lisa Easter. RP 79-80, 158-60.¹ As a result of that conviction, the trial court issued an order precluding Wells from contacting Easter for five years. RP 79-80, 160-62.

In 2010, Wells was charged by way of amended Information with three counts including Count One: Felony Telephone Harassment – Domestic Violence; Count Two: Domestic Violence Misdemeanor Violation of a Court Order; and Count Three: Domestic Violence Misdemeanor Violation of a Court Order. CP 30. The felony telephone

¹ The Verbatim Report of Proceedings consists of Clerk's Papers designated as CP (dated July 27, 2010); and the verbatim transcript of recorded trial designated as RP (dated April 5, 2010).

harassment charge arose out of several telephone messages received by the victim in the fall of 2009. RP 80-81.²

On April 5, 2010, trial began before the Honorable Regina Cahan. RP 2. On April 7, 2010, the jury found Wells guilty as charged on all three counts. RP 151-201.

At sentencing, the court imposed 22 months in custody, to be served consecutively with the sentences for counts two and three. RP 215.

2. SUBSTANTIVE FACTS

Wells and Easter dated for approximately six months. RP 77-78. Wells was convicted in April 2008 for felony harassment of Easter and by court order, he was to have no contact with Easter for five years. RP 79-80, 158-62.

In the fall of 2009, Wells called Easter on the telephone several times and left threatening voicemail messages. RP 80-81. Easter saved those threatening messages and reported them to Wells' Community Corrections Officer (CCO) on October 19, 2009. RP 83-84, 107-12, 134-35, 144. The CCO contacted the police and a detective recorded the messages off of Easter's phone. RP 136, 157-58. The CCO arrested Wells later that day. RP 137, 142.

² These calls resulted in a felony pursuant to RCW 9A.36.120(2)(a).

During the time she received the threatening message from Wells, she ran into Wells several times in Seattle's Belltown neighborhood where Easter lives. RP 111. Further, Easter stated that: "I lived downtown at an apartment building on 4th and Bell ... Yea, he knew I was staying there ... that's where he said he's going to come kick the door." RP 112. She added that Wells knows a lot of people and knows where she is all times. RP 112-13.

Also at trial, the State played a recording of the threatening message and admitted the order prohibiting Wells from contacting Easter. RP 86-97. Wells left two messages on October 3, 2009. In the first, he said: "Bitch, if you ever mother fucking talk to me like that again, I'll come all the way down to that mother fucking God damn and kick that mother fucking door in. Call me." RP 94. The State based the harassment charge on this message. RP 179. According to Easter, Wells was responding to a telephone conversation they had earlier, during which she told him she wanted nothing more to do with him and for him not to call her anymore. RP 104. The State properly instructed the jury with the threat instruction. CP 28 (instruction 9); WPIC 2.24.

The jury ultimately found Wells guilty of all three counts. CP 36-38.

C. ARGUMENT

1. THE EVIDENCE IS SUFFICIENT TO PROVE THAT WELLS' THREATS WERE "TRUE THREATS."

Wells contends that the evidence in this case is insufficient to prove that he made "true threats" to Easter because a reasonable speaker in Wells' position would not have foreseen that Easter would take the threatening voicemail messages seriously. Appellant's Brief 3. Given the evidence in this case, Wells' argument is unpersuasive.

Because Wells' argument implicates First Amendment concerns, "[i]t 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." State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170 (2008), rev'd on other grounds, State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010),³ (citing State v. Kilburn, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004)). Instead, this Court applies the rule of independent review "under which this court 'must independently review the crucial facts in the record, i.e., those which bear on the constitutional question.'" Id. Review is not entirely de novo, but does require "full review of only those facts in [the] record that relate to the First Amendment question whether certain

³ The State Supreme Court reversed on the grounds that the trial court did not properly instruct the jury on the threats instruction. In the present matter, the court properly instructed the jury on the threats instruction. State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010). CP 28 (instruction 9); WPIC 2.24.

expression was unprotected." Id. However, the Court must still defer to credibility findings. Id.

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 person." Kilburn, 151 Wn.2d at 43. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Id. at 44. The relevant question is whether a reasonable person in the speaker's position would foresee that in context, the listener would interpret the statement as a serious threat. Id. at 46. Here, Wells' threats clearly meet this test.

After Easter told Wells that she wanted nothing more to do with Wells and asked him to stop contacting her, Wells left several voicemail messages for Easter. In one voicemail, Wells threatened to "come all the way down...and kick that mother fucking door in." RP 104, 179. Easter testified that she believes that Wells "knows a lot of people" and that Wells "knows where I'm at all times." RP 111-13. Moreover, an earlier voicemail message, played at trial, also indicated Wells' threatening tone. "Hey, bitch, you know what, (inaudible) down nigger. But you know what, I hope you know what the fuck you did because I mother fucking raised some havoc again." RP 89-90. Considering this message and the

later threatening message which formed the basis of the harassment charge, the speaker should have known the threat would be interpreted as a true threat. Additionally, despite the no-contact order prohibiting Wells from contacting Easter, Wells had recently been in contact with Easter in the neighborhood where Easter lives. RP 111. Under these circumstances, a reasonable person in Wells' position would have foreseen that Easter would interpret Wells' threats as a true statement of Wells' intention to inflict bodily harm on Easter.

In sum, an independent review of the record clearly supports a finding that Wells made "true threats." This Court should therefore affirm all of Wells' convictions.

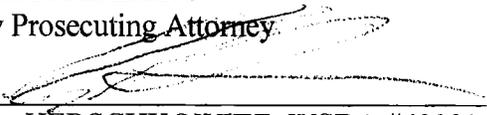
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm all of Wells' convictions.

DATED this 7th day of March, 2011.

Respectfully submitted,

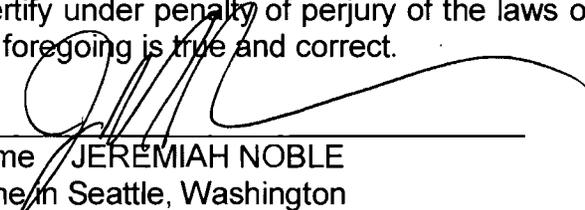
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Division One Court of Appeals, the attorney for the appellant, Andrew P. Zinner at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ANDRE D. WELLS, Cause No. 65526-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name JEREMIAH NOBLE
Done in Seattle, Washington

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