

FILED
September 4, 2015
Court of Appeals
Division I
State of Washington

NO. 73339-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

J.K.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY, JUVENILE
DIVISION

The Honorable Deborra Garrett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find appellant guilty of cyberstalking beyond a reasonable doubt.

2. Appellant's adjudication of guilt for cyberstalking violates the First Amendment because the State failed to prove her statements amounted to a true threat.

3. The court erred in denying appellant's motion to revise.

4. The Commissioner erred in finding appellant acted with the intent to embarrass, harass, and torment. CP 27 (Commissioner's Finding of Fact 8).

5. The Commissioner erred in finding appellant knew S.G. would feel bad after reading the messages. CP 27 (Commissioner's Finding of Fact 9.)

6. The Commissioner erred in finding that the messages were made to the public, which included S.G. CP 27 (Commissioner's Finding of Fact 11).

7. The Commissioner erred in finding that a reasonable person in appellant's position would anticipate S.G. would take the messages as a serious expression of intent to carry out a threat. CP 27 (Commissioner's Finding of Fact 13).

8. The court erred in concluding appellant acted with the intent to harass, intimidate or embarrass. CP 49.

9. The court erred in concluding appellant's electronic messages constitute a true threat. CP 49.

Issues Pertaining to Assignments of Error

1. The cyberstalking statute requires proof of specific intent to harass, intimidate, torment, or embarrass by communicating a threat of harm to another person via electronic communication. Appellant posts frequent short online messages known as "tweets," which although public, are automatically visible only to those who "follow" her account on the website known as "Twitter." The alleged victim does not have a Twitter account and only learned of the statements through a third party. Was the evidence insufficient to establish this essential element when there was no evidence appellant intended the alleged victim to even become aware of her statements?

2. To avoid violating the First Amendment's protection of free speech, statutes proscribing threatening speech must be limited to true threats that would, considering the circumstances, reasonably be foreseen as serious expressions of intent to carry out the threat. Appellant posted two tweets stating, "still want to punch you in the throat even tho it was 2 years ago" and "#[S.G.]mustdie." S.G. testified she did not believe

appellant intended to harm her. The girl who showed the tweets to S.G. was not asked whether she took them as a serious threat. Was the evidence insufficient to show that a reasonable person under these circumstances would have foreseen that the tweets would be taken as a serious expression of intent to harm S.G.?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County prosecutor charged appellant J.K. with one count of cyberstalking. CP 6. The Commissioner found J.K. guilty and the superior court, juvenile department, affirmed, denying J.K.'s motion to revise. CP 27, 49. The court imposed six months of probation and 30 hours of community service. CP 30-31. Notice of appeal was timely filed. CP 53.

2. Substantive Facts

When J.K. was in eighth grade, a classmate, S.G., informed a teacher that a student (not J.K.) was behaving oddly. 1RP¹ 93-94, 145-56. As a result, J.K. and the other student were suspended from school. 1RP 145-46. The two girls have had no other interaction with each other until this incident. 1RP 97-98.

Two years later, J.K. and S.G. were in the same class as sophomores in high school. 1RP 130-31. One day in November 2013, J.K. saw S.G. in

¹ There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 4, 2014; 2RP – Mar. 12, 2014; 3RP – July 29, 2014.

class and was reminded of the incident two years before. 1RP 131, 151. She quickly posted two short messages known as tweets via the website Twitter. The first read, “Tbh² still want to punch you in the throat even tho it was 2 years ago.” The second read, “[S.G.]mustdie.” 1RP 130-31.

J.K. explained that she posts tweets frequently and uses the site almost like a journal, posting her thoughts, reactions, sometimes jokes. 1RP 131-32. She testified she sent the messages quickly and without thinking, as a fleeting expression of her agitation at the memory. 1RP 131. Although she is aware the posts are public, and she has around 100 people who follow her, she testified she did not consider the potential impact on S.G. 1RP 131, 143.

For nearly a full day after these tweets, there was no reaction. None of J.K.’s Twitter followers mentioned them to her or responded to them in any way. 1RP 132. S.G. was unaware of the tweets. The next day, however, another student, I.R., who follows J.K. on Twitter noticed the tweets and showed them to S.G. 1RP 60.

I.R. explained that, on the Twitter website, a person can search for J.K.’s page and see anything she has posted that is not specifically blocked. 1RP 59. The only reason she became aware of J.K.’s tweets was that she

² I.R. testified “Tbh” is an abbreviation for “to be honest.” 1RP 62.

follows J.K. on Twitter, which means that anything J.K. posts automatically appears on I.R.'s Twitter page. 1RP 59.

S.G. testified she felt angry and embarrassed because she knew others would see the tweets. 1RP 90. She was not frightened; she did not really think J.K. would hurt her. 1RP 97. She showed the tweets to the dean of students, who, after consulting with other administrators, called the police. 1RP 73-74.

J.K. immediately admitted she had posted the tweets and explained she never intended to harm S.G. 1RP 36, 40. Well before she learned of any criminal charges, she also wrote a letter apologizing to S.G. for the upset that she caused by her thoughtless conduct. 1RP 138.

After trial, the commissioner found J.K. guilty of cyberstalking, finding J.K. acted with the intent to embarrass, harass, and torment S.G. and was not credible on the question of whether she considered the consequences before posting. CP 27. The court also concluded the tweets constituted a true threat. CP 27. The superior court affirmed the intent and true threat findings and denied J.K.'s motion to revise. CP 49.

C. ARGUMENT

1. THE STATE FAILED TO PROVE CYBERSTALKING BEYOND A REASONABLE DOUBT BECAUSE THERE WAS NO EVIDENCE OF SPECIFIC INTENT.

The crime of cyberstalking consists of three elements: 1) the intent to harass, intimidate, torment, or embarrass another person, 2) a threat to inflict injury on the person, and 3) an electronic communication. RCW 9.61.260. The State failed to prove the first element, specific intent because there was no evidence that J.K. intended for S.G. to even learn about these posts, let alone feel harassed by them.

A conviction must be reversed for insufficient evidence when, viewed in the light most favorable to the State, no rational trier of fact could have found the elements of the crime beyond a reasonable doubt. In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). The Superior Court's review on a motion to revise a commissioner's ruling is de novo. State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132, 136 (2004). Appellate courts review the superior court's decision, rather than the commissioner's. Id. The superior court here considered two questions: whether the evidence was insufficient to prove the specific intent to harass, embarrass, intimidate, or torment and whether the evidence was insufficient to prove a true threat, as required by the first amendment. CP 49.

The cyberstalking statute requires the person specifically intend to harass, intimidate, torment, or embarrass another person. RCW 9.61.260(1). Thus, the intent the State must prove at trial is not the general intent to perform an act that leads to the stated consequences. See RCW 9.61.260(1); State v. Elmi, 166 Wn. 2d 209, 215, 207 P.3d 439, 442 (2009) (distinguishing general and specific intent). Nor is it recklessly performing an act while disregarding the risk of those consequences. RCW 9.61.260(1). It is not even performing the act knowing those consequences may likely result. Id. It is the specific intent to cause those consequences. Id.; Elmi, 166 Wn.2d at 215. The evidence of that specific intent is lacking in this case because the State failed to provide any evidence J.K. intended S.G. to even find out about these messages.

A person cannot be harassed, intimidated, tormented or embarrassed by messages that the person is entirely unaware of. Thus, the State cannot show the requisite intent unless it can show J.K. intended that S.G. learn of these messages. This it cannot do.

J.K.'s tweets were not sent to S.G. The uncontroverted testimony from I.R. showed that S.G. does not even have a Twitter account. 1RP 58. Thus, there were only two ways S.G. could find out about them: either she would have to actively seek out J.K.'s twitter page or a third party would

have to pass along the message. There was no evidence J.K. had any reason to think either of these scenarios was likely, let alone that she intended them.

The sheer quantity of information sent out via social media such as twitter makes it unlikely that uninterested parties will receive the information. Both girls testified they had never been friends and had no interaction whatsoever in two years. 1RP 97-98, 129. Based on that history, J.K. had no reason to believe S.G. would read her tweets. Nothing about J.K.'s wording suggests that a third party should pass along the message. Had I.R. not taken it upon herself to intervene, J.K.'s angry venting would likely never have come to S.G.'s attention. No evidence was presented that J.K. intended that I.R. or anyone else pass the tweets along to S.G.

The State may argue that the public setting, making J.K.'s twitter page viewable by almost anyone, shows an intent to communicate these tweets to S.G. and the entire world. This is pure speculation. I.R. testified all tweets are public unless specifically blocked. 1RP 59. The mere fact that J.K. failed to block her account from public view does not show the specific intent to harass a specific individual who she had no reason to believe would ever read her writings.

The State may also argue it was foreseeable that someone among J.K.'s approximately 100 followers, would pass along what she had said. But the statute requires more than foreseeability. It requires specific intent.

RCW 9.61.260. Similarly, the State may argue J.K. knew her Tweets could harass or embarrass others because she knew the site was public. But knowledge is also insufficient to show she intended to harass S.G. The mere knowledge that Twitter is public does not provide any evidence that J.K. intended her messages be passed along to S.G. by a third party.

The State will likely point out that that Commissioner found J.K. not creditable on the question of whether she considered the consequences of her actions. CP 27. But regardless of this finding, the State still bears the burden to present affirmative evidence of J.K.'s intent. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The fact that J.K.'s testimony was found not credible means it cannot be relied on, but it does not permit the State to rely on it as proof of the contrary proposition. The existence of a fact cannot rest in guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The State has failed to present any evidence that J.K. intended S.G. be harassed, intimidated, tormented or embarrassed as a result of the tweets.

2. J.K.'S CONVICTION VIOLATES THE FIRST AMENDMENT BECAUSE THE EVIDENCE DOES NOT SHOW A TRUE THREAT.

J.K. was convicted of cyberstalking under RCW 9.61.260(1)(c), which proscribes "threatening to inflict injury on the person or property of the person called or any member of his or her family or household."

Because this prong of the statute criminalizes pure speech, the First Amendment is implicated. See State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001) (felony harassment statute, which criminalizes pure speech, “must be interpreted with the commands of the First Amendment clearly in mind.”).

Despite the substantial protection afforded freedom of speech under the First Amendment, the State may enact laws prohibiting “true threats.” State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004). A true threat is “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 individual.” Williams, 144 Wn.2d at 207-08 (internal quotes omitted). Statutes proscribing threats must be construed as limited to true threats in order to avoid invalidation for overbreadth under the First Amendment. State v. Johnston, 156 Wn.2d 355, 363-64, 127 P.3d 707 (2006). Whether a true threat has been made is determined under an objective standard that focuses on the speaker, not the listener. Id. at 361.

When the First Amendment true threat analysis is implicated, reviewing courts independently examine the record to ensure that protected speech is not penalized. Kilburn, 151 Wn.2d at 50-52 (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505,

104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). While not amounting to full de novo review, the court has a “special responsibility” to independently review the crucial facts relating to whether speech is protected. Id. The true threat analysis includes consideration of the entire context of the statement, including facts ignored by a lower court. Kilburn, 151 Wn.2d at 47, 51.

Even if the plain meaning of the words used may appear to be a threat, the words may not amount to a true threat based on the context. For example, in N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the court held the N.A.A.C.P. chairman’s speeches, although the words purported to threaten violence, were protected speech because no harm actually resulted and because they were part of the passionate and highly charged political rhetoric of the civil rights movement. Id. at 926-29.

Similarly, in the case that gave rise to the definition of a true threat, Watts v. United States, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), Watts declared during a group discussion at an antiwar rally, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” Watts and the others laughed after he made his statement. The U. S. Supreme Court reversed Watts’ conviction for threatening the president,

concluding that taken in context and considering the reaction of the listeners the statement was not a true threat. Id. at 706-08.

More recently, in Kilburn, the Washington Supreme Court reversed a conviction for harassment based on a threat made to a school classmate. 151 Wn.2d at 38-39. In that case, K.J. came to school and told a friend, “I’m going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first.” Id. at 39. The friend thought he might be joking but was not sure. Id. As she thought about it more, she began to fear he was serious and told her parents, who called 911. Id. Despite the inherently alarming nature of K.J.’s statements, the court found insufficient evidence of a true threat. Id. at 54.

First, the court noted that K.J. had stated he was only joking and the trial court found him credible. Id. at 52. He testified that when he made the statement, he was with a group of students standing around chatting and giggling about a book involving guns and the military. Id. at 52. The friend confirmed that after he made the statement, K.J. began giggling as if he were not serious. Id. at 52. The friend testified that, at the time, she was not scared, but only surprised because, in the two years she had known him, K.J. had always treated her nicely. Id. at 52. Based on these facts, the court concluded that a reasonable person in K.J.’s position would not reasonably foresee that the threat would be taken seriously. Id. at 53.

“Innocent blather and jokes about harming people are protected by the First Amendment.” State v. King, 135 Wn. App. 662, 669, 145 P.3d 1224 (2006). This case also involves circumstances under which a reasonable person would not foresee the threat would be taken seriously. J.K. made these statements on Twitter. Although the tweets are publicly available, the only people who automatically see her tweets are those who regularly follow her. 1RP 59. From J.K.’s perspective, such people could reasonably be counted on to understand that she was merely venting her irritation and not actually threatening S.G. A reasonable person in J.K.’s position would not foresee that her Twitter followers would take her statements as a true expression of intent to cause bodily injury to a classmate. Even S.G., who does not know J.K. well and who knows that J.K. might resent her because of the incident two years earlier, did not view these tweets as expressing actual intent to cause physical harm. 1RP 93, 94, 97.

Moreover, the superior court’s oral ruling³ on the motion to revise shows that the court applied the wrong standard by blending the true threat analysis with the specific intent analysis. The court explained, “I find that they are true threats in that the writer of the words using an objective standard would have reason to believe that the subject of the threats could or would feel intimidated.” 2RP 31. But the standard for a true threat is not

³ Appellate courts may rely on the oral ruling to interpret written conclusions so long as they are not inconsistent. State v. Bynum, 76 Wn.App. 262, 266, 884 P.2d 10 (1994).

whether the person might feel intimidated. It is whether a reasonable person would, under the circumstances, foresee that the threat would be taken as an indication of actual intent to carry out the threatened conduct. Williams, 144 Wn.2d at 207-08.

The court also applied the wrong standard by disregarding the context and focusing solely on the plain language of the tweets: “Evaluated by any kind of objective standard those words are very threatening. So is the other tweet about wanting to punch her in the throat I think the commissioner was correct in applying an objective standard to the words themselves.” 2RP 28. The court also reasoned that J.K. “had in her bank of knowledge her understanding of the English language and what those words meant objectively.” 2RP 29.

Kilburn illustrates that the objective meaning of the words used is not the correct analysis. Under the superior court’s reasoning, K.J.’s conviction for harassment would have been upheld based on the words themselves and his understanding of English, regardless of the context. See Kilburn, 151 Wn.2d at 39 (juvenile told friend, “I’m going to bring a gun to school tomorrow and shoot everyone.”). Kilburn mandates that courts consider the context in which the statements were made, the person or persons to whom the statements were made, and the relationships between the persons. 151 Wn.2d at 47, 51. When these facts are taken into account here, the evidence

shows J.K. would not reasonably foresee that her Twitter followers would take her statement as an expression of her actual intent to do physical harm to S.G. No one even asked I.R., the only Twitter follower of J.K. to testify at trial, how she interpreted them.

Additionally, language of the text is not an express threat of future harm. The first tweet states “I still want to punch you in the throat.” 1RP 130-31. This expression of desire, rather than plan or intent, could reasonably be interpreted as merely an expression of intense dislike. The addition of the “[S.G.]mustdie” tweet, which could reasonably be seen as an example of the literary device of hyperbole, does not alter this conclusion.

An independent review of these facts leads to the conclusion that J.K.’s tweets were not a true threat. “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. The First Amendment demands more.” Kilburn, 151 Wn.2d at 49. Reversal is required because the State failed to prove beyond a reasonable doubt that J.K. made a true threat that was unprotected speech.

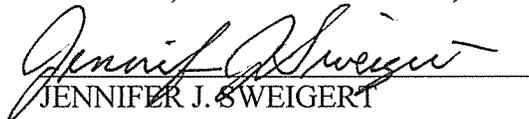
D. CONCLUSION

J.K.'s adjudication of guilt for cyberstalking must be reversed because the evidence was insufficient to prove beyond a reasonable doubt that she had the specific intent to harass or embarrass J.K. or that her statements were a true threat unprotected by the First Amendment.

DATED this 4th day of September, 2015.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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v.)	COA NO. 73339-7-I
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] J.K.
1820 LAKESIDE AVENUE
BELLINGHAM, WA 98226

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF SEPTEMBER 2015.

x *Patrick Mayovsky*