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Division I
State of Washington

NO. 74746-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

RAJABU HAKIZIMANA,

Appellant.

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

The Honorable Richard McDermott, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issue Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural History</u>	2
2. <u>Trial Testimony</u>	2
3. <u>Motion to Arrest Judgement</u>	6
C. <u>ARGUMENT</u>	8
1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE FELONY HARASSMENT BECAUSE THE STATE FAILED TO PROVE HAKIZIMANA INTENDED TO CAUSE RENZAHO TO FEAR BODILY INJURY OR DEATH	8
a. <u>Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt</u>	8
b. <u>The Washington Supreme Court adopted a negligence standard before the U.S. Supreme Court decided <i>Virginia v. Black</i> and <i>Elonis v. United States</i></u>	11
c. <u>A mens rea of negligence is insufficient under the First Amendment and <i>Virginia v. Black</i></u>	14
d. <u>Other courts have abandoned the negligence standard in light of <i>Black</i></u>	16
e. <u>A mens rea of negligence is insufficient in light of due process principles as explained in <i>Elonis</i></u>	21
f. <u>Hakizimana’s case demonstrates the importance of adopting a subjective intent standard</u>	25

TABLE OF CONTENTS (CONT'D)

	Page
g. <u>The trial court erred in denying Hakizimana's motion to arrest judgment where the State failed to present sufficient evidence.</u>	27
2. APPEAL COSTS SHOULD NOT BE IMPOSED.....	28
D. <u>CONCLUSION</u>	30

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Anderson</u> 141 Wn.2d 357, 5 P.3d 1247 (2000).....	24
<u>State v. Bauer</u> 180 Wn.2d 929, 329 P.3d 67 (2014).....	22
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	29
<u>State v. Coleman</u> 54 Wn. App. 742, 775 P.2d 986 <u>rev. denied</u> , 113 Wn.2d 1017 (1989).....	27
<u>State v. Deer</u> 175 Wn.2d 725, 287 P.3d 539 (2012) <u>cert. denied</u> , 133 S. Ct. 991, 184 L. Ed. 2d 770 (U.S. 2013).....	8
<u>State v. Hardesty</u> 28 129 Wn.2d 303, 915 P.2d 1080 (1996).....	28
<u>State v. J.M.</u> 144 Wn.2d 472, 28 P.3d 720 (2001).....	12, 21
<u>State v. Kilburn</u> 151 Wn.2d 36, 84 P.3d 1215 (2004).....	1, 9, 10, 28
<u>State v. Longshore</u> 97 Wn. App. 144, 982 P.2d 1191 (1999) <u>aff'd</u> , 141 Wn.2d 414, 5 P.3d 1256 (2000).....	28
<u>State v. Schafer</u> 169 Wn.2d 274,236 P.3d 858 (2010).....	12
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 <u>rev. denied</u> , 185 Wn.2d 1034, 377 P.3d 733 (2016).....	29

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Spruell</u> 57 Wn. App. 383, 788 P.2d 21 (1990).....	28
<u>State v. Williams</u> 144 Wn.2d 197, 26 P.3d 890 (2001).....	1, 9, 12
<u>United States v. Houston</u> 792 F.3d 663 (6th Cir. 2015)	23, 24
 <u>FEDERAL CASES</u>	
<u>Elonis v. United States</u> ___ U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015).....	11, 13, 14, 21-24
<u>Gitlow v. New York</u> 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).....	10
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	8
<u>North Carolina v. Pearce</u> 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).....	28
<u>State v. Trey M. (No. 92593-3)</u>	8
<u>United States v. Bagdasarian</u> 652 F.3d 1113 (9th Cir. 2011)	13, 19
<u>United States v. Heineman</u> 767 F.3d 970 (10th Cir. 2014)	13, 16, 17, 18
<u>United States v. Khorrami</u> 895 F.2d 1186 (7th Cir. 1990)	12
<u>United States v. Parr</u> 545 F.3d 491 (7th Cir. 2008)	13, 20, 21

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Virginia v. Black</u> 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). 2, 11, 13, 14, 16- 21, 24	
<u>Watts v. United States</u> 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).....	11

OTHER JURISDICTIONS

<u>Brewington v. State</u> 7 N.EJd 946 (Ind. 2014).....	13, 19
--	--------

Rules

RAP 14.....	29
RCW 10.73.160	29
U.S. Const. amend. I.....	<i>Passim</i>
U.S. Const. amend. XIV	8

A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to sustain appellant's conviction for felony harassment.

2. The conviction for felony harassment violates the First Amendment to the United States Constitution.

3. The trial court erred when it denied appellant's motion to arrest judgment where the State failed to present sufficient evidence to sustain appellant's conviction for felony harassment.

Issue Pertaining to Assignments of Error

The First Amendment guarantees freedom of speech, and therefore statutes criminalizing pure speech must be narrowly construed. As relevant here, statutes prohibiting threats must be confined to "true threats," which the Washington Supreme Court has defined as "statements made in a context in which a reasonable speaker in the defendant's place would foresee that his statement would be interpreted as a serious threat to cause bodily injury or death."¹ The U.S. Supreme Court however, has described true threats as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," and where the speaker has "the intent of

¹ State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001).

placing the victim in fear of bodily harm or death.”² Here, the State did not prove that appellant had the subjective intent of placing the complaining witness in fear of bodily harm or death. Did the State fail to prove a true threat as defined by the U.S. Supreme Court, rendering the conviction for felony harassment unconstitutional?

B. STATEMENT OF THE CASE

1. Procedural History.

The King county prosecutor charged appellant Rajabu Hakizimana with one count of felony harassment for an incident that occurred on September 11, 2015. 1-7, 9. A jury found Hakizimana guilty as charged. CP 61; RP 405.

The trial court sentenced Hakizimana to three months in the king county jail with credit for time already served. The trial court imposed no community custody. CP 64-71; RP 433. Hakizimana timely appeals. CP 75-76.

2. Trial Testimony.

Hakizimana is a refugee from Burundi who arrived in the United States in August 2015. RP 119-20, 303. He spoke no English. RP 211-

² Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

12, 232, 257-58. He is also missing both hands, perhaps as a result of civil war fighting in his home country. RP 120, 210, 246, 278, 304; CP 15.

Bebe Renzaho and her husband, Floribert Mubalama, were also refugees who immigrated to the United States from the Democratic Republic of Congo in 2014. RP 117, 300. They agreed to let Hakizimana live with them until he could obtain his own housing. They had never met or spoken with Hakizimana before he moved into their house. RP 119-20, 303-05.

Renzaho cooked food for Hakizimana and did his laundry. RP 121. Hakizimana spent the days watching television and smoking cigarettes. RP 122. Mubalama often worked overnight so Renzaho would sleep with her children inside a locked bedroom. RP 126-27.

Hakizimana mentioned he felt tired and explained to Renzaho and Mubalama several times that he wanted his own home. RP 130-31, 305-07. Hakizimana recounted to Renzaho the horrors that he had experienced in Burundi. He explained that he was a police officer and had killed people and earned a "red cap". RP 123, 150. He told Renzaho that he could kill and rape anyone that he wanted in Burundi. RP 124. Hakizimana told Renzaho about a dream where he sexually abused a woman he was living with. The woman did not want her husband to have him arrested but agreed to call 911 because it made the husband happy.

RP 124-25. Renzaho told Hakizimana, “Oh, you dreamt that but please do not do that at my home.” Hakizimana assured Renzaho that he “would never do that to me.” RP 125.

On September 11, 2015, Hakizimana called Renzaho and left a voicemail message stating that he did not “want anyone to play with me.” RP 128, 314-15. Renzaho thought Hakizimana’s voice sounded different. Hakizimana assured Renzaho that he was just joking around. RP 128-30.

Later that same day, Mubalama left Renzaho and the children at the house while he went to the store. RP 308-09. Mubalama encountered Hakizimana on the street as he left. Hakizimana was “calm” when Mubalama spoke with him. RP 321-22.

When Hakizimana returned to the house he again told Renzaho that he wanted his own home. RP 130-31, 311, 319. With a raised voice, Hakizimana asked Renzaho to make sure that Mubalama was making an effort to obtain him a home. RP 130. Renzaho saw Hakizimana’s face change and his eyes become red and his veins swollen. RP 131. In response, Renzaho called Mubalama who was still at the store. RP 131-32. Hakizimana sounded “firm” and told Mubalama he needed a home right now. RP 319. Mubalama told Hakizimana they would talk further when he returned from the store. RP 309-11. Mubalama heard fear in

Renzaho's voice and told her to call 911 if she believed it necessary. RP 132, 148, 311, 317.

Hakizimana remarked that if Mubalama was not going to make an effort to get him a house "he's going to kill somebody and he's going to burn down the house." RP 132, 138, 144-45. Hakizimana told Renzaho to work hard to get him a home. RP 138. Renzaho did not leave the house because she believed Hakizimana would go to his room and calm down. RP 147.

Hakizimana then stood up and walked to the kitchen. He washed a knife in the sink that Renzaho had just used to prepare food. RP 132, 138, 148-49. Hakizimana then faced Renzaho with the knife. RP 132, 138. His eyes were red and his veins were big. RP 139. Hakizimana did not say anything to Renzaho. He did not threaten Renzaho. Hakizimana did not assault Renzaho. RP 146, 151-52, 261-62. In fact, Hakizimana did not do "anything at all with the knife." RP 149-50.

Renzaho nonetheless took her children and left the house. RP 132-33, 139, 149-50. Renzaho explained that she remembered what Hakizimana had told her previously and "so I just knew that this is it." RP 139. She believed Hakizimana might kill her "because he had changed." RP 154-56. Renzaho stood outside the house. She believed Hakizimana was following her so she walked further down the street and called police.

RP 132-33, 139. Renzaho told police that Hakizimana had made threats that he was going to carry out on October 1. RP 239, 242, 260-61.

While speaking with Renzaho, police saw Hakizimana exit the house. RP 197-98, 243-44. He was about 50-feet-away from where police and Renzaho stood. RP 276. He was holding a knife. RP 245, 262, 277. When police moved toward Hakizimana he turned to go back inside the house. RP 205, 208-09, 244-46, 276-77. Hakizimana complied with police commands to stop and drop the knife. RP 208-09, 246-47, 264.

Hakizimana was arrested without incident. RP 247. He appeared occasionally agitated and possibly intoxicated. RP 185-86, 211-12, 231-32, 259, 278. Police could not understand what Hakizimana was saying to them because of the language barrier. RP 211-12, 232, 257-58.

3. Motion to Arrest Judgment.

Before sentencing Hakizimana moved to arrest judgment, arguing the State failed to present sufficient evidence that Hakizimana subjectively knew that whatever conduct he took was communicating an intent to kill Renzaho. RP 408-15. In arguing the motion, defense counsel noted that there was no evidence as to what Hakizimana's subjective intent was. Renzaho had acknowledged she did not know what Hakizimana's intent was in touching the knife. RP 152, 409-10. Counsel noted that Renzaho

did not fear for her life before Hakizimana touched the knife and there was no evidence about what Hakizimana intended to do or convey by touching and washing the knife. RP 413-14, 422-23. Defense counsel clarified the sufficiency challenge was distinct from what was in Renzaho's head and the issue of whether her fear of Hakizimana was reasonable. RP 415.

In response, the State maintained Renzaho's testimony about what Hakizimana had told her about his experiences in Burundi, his statements to her on the day of the incident, his grasping of a knife, and his demeanor, created "a reasonable inference," that he knew his conduct conveyed an intent to kill. RP 415-17, 420-22; Supp. CP __ (sub no. 41, State's Response to Defendant's Motion for Arrest of Judgment, dated 2/5/16).

The trial court recognized Hakizimana's act of washing the knife was inconsistent with someone who intended to use the knife to commit an assault. RP 417-19, 421-23. As the trial court explained:

It seems to me if he would have just picked up the knife and turned around, I'd feel a little bit more comfortable with my ruling. But the stop and wash it, that really – so, I guess, I want each one of you – I know what [defense counsel's] going to say – but don't you think that that adds some credibility to [defense counsel's] argument about what the intent of Mr. Hakizimana was?...I don't know how I'm going to rule. I mean, I haven't made up mind. I wanted to hear the argument because I thought long and hard about this case.

RP 418-19.

The trial court reserved ruling on the motion in order to “sleep on this and decide what I’m going to do[.]” RP 424. Almost one week later, the trial court denied the motion. RP 426-27. The trial court noted the jury had rejected a lesser-included instruction of misdemeanor harassment and “I don’t see enough evidence or enough that I can undo that[.]” RP 427.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE FELONY HARASSMENT BECAUSE THE STATE FAILED TO PROVE HAKIZIMANA INTENDED TO CAUSE RENZAHO TO FEAR BODILY INJURY OR DEATH³

a. Due Process requires the State to prove every element of the crime charged beyond a reasonable doubt.

Due process requires the State to prove each element of a charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012), cert. denied, 133 S. Ct. 991, 184 L. Ed. 2d 770 (2013). Crimes that have a threat to commit

³ Whether the State must prove that the defendant subjectively intended the recipient of the defendant’s communication to perceive the communication as a genuine threat to kill or knew that the communication would be perceived as such is currently pending before the Washington State Supreme Court in State v. Trey M. (No. 92593-3). Oral argument in that case was heard on May 5, 2016.

bodily harm as an element require the State to prove the threat was a “true threat” so as not to violate the First Amendment’s free speech clause. State v. Kilburn, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004); State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001).

Here, the jury was instructed that, “to be a threat, a statement or act must occur in the context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk or political argument.” CP 57 (instruction 12). The to-convict instruction for felony harassment required each of the following elements to be proved beyond a reasonable doubt:

- (1) That on or about September 11, 2015, the defendant knowingly threatened to kill Bebe Renzaho immediately or in the future;
- (2) That the words or conduct of the defendant placed Bebe Renzaho in reasonable fear that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority;
and
- (4) That the threat was made or received in the State of Washington.

CP 52 (instruction 7).

In light of the First Amendment, statutes criminalizing pure speech must be narrowly construed and “threats” may be prohibited only if they are “true threats”. The harassment statute criminalizes pure speech, and therefore “must be interpreted with the commands of the First Amendment clearly in mind.” Kilburn, 151 Wn.2d at 41; see U.S. Const. amend. I (government may not abridge freedom of speech); Gitlow v. New York, 268 U.S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) (First Amendment applies to the states through the Fourteenth Amendment). Because the right to free speech is “vital,” only a few narrow categories of communication may be proscribed. Kilburn, 151 Wn.2d at 42.

Although a “threat” is one of those categories, the only type of threat which may be criminalized without running afoul of the First Amendment is a “true threat.” Id. at 43. The Washington Supreme Court has defined a true threat as “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 (internal quotations omitted). The Washington Supreme Court has held that this is an objective standard that focuses on the viewpoint of a reasonable speaker under all of the circumstances. Id. at 44. As explained below however, under the United States Supreme

Court's definition of "true threat," the State failed to meet its burden to prove that Hakizimana's statements fell outside the protection of the First Amendment.

- b. The Washington Supreme Court adopted a negligence standard before the U.S. Supreme Court decided *Virginia v. Black* and *Elonis v. United States*.

In *Watts v. United States*, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), the U.S. Supreme Court reversed the conviction of a man who objected to the draft and said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The Court noted that the statute at issue criminalized pure speech, and emphasized that such statutes "must be interpreted with the commands of the First Amendment clearly in mind." Id. at 707. The statute required "the Government to prove a true 'threat,'" Id. at 708, and "[w]hat is a threat must be distinguished from what is constitutionally protected speech." Id. at 707. Although it held the defendant's statements were protected speech and not a true threat, the Court did not set forth a standard for determining the difference in future cases. See Id. at 707-08.

In the wake of *Watts*, most courts adopted an objective test for evaluating whether a statement is a true threat or constitutionally protected speech. The Washington Supreme Court adopted such a standard in *State*

v. Williams, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001). In so doing, the Court relied on the judgment of the Seventh Circuit. See Id. (citing United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)); State v. J.M., 144 Wn.2d 472, 479 n.4, 28 P.3d 720 (2001) (citing Khorrami). The Washington Supreme Court stated:

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 individual].

Williams, 144 Wn.2d at 207-08 (internal quotations omitted). In other words, this Court adopted a civil negligence standard for determining whether a defendant has uttered a true threat instead of constitutionally protected speech. See State v. Schafer, 169 Wn.2d 274, 287, 236 P.3d 858 (2010).

Although Williams endorsed the above standard, it was immaterial to the outcome. The Court reversed the defendant’s conviction for felony harassment on two independent grounds unrelated to the definition of “true threat.” It held that a prior version of the harassment statute was both vague and overbroad insofar as it criminalized threats to “mental health.” Williams, 144 Wn.2d at 212. Thus, the Court had no need to analyze the “true threat” definition in depth, and did not do so. See Id. at 207-08. Two years after Williams, the U.S. Supreme Court decided

Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). As will be discussed below, Black called into question the constitutionality of the objective (negligence) standard for assessing true threats. Following Black, several courts replaced the objective negligence standard with a subjective intent standard, holding that the First Amendment requires prosecutors to prove the speaker intended to intimidate the victim - in other words, that the speaker intended to place the victim in fear of bodily harm or death. See United States v. Heineman, 767 F.3d 970, 976 (10th Cir. 2014); Brewington v. State, 7 N.EJd 946, 964-65 (Ind. 2014); United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011); see also United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008) (not reaching issue because jury was instructed it had to find intent, but opining that negligence standard is unconstitutional under Black).

Unlike these courts, the Washington Supreme Court has not yet had occasion to address the impact of Black on the negligence standard. The Supreme Court's even more recent decision in Elonis also provides persuasive authority for the proposition that a negligence standard is insufficient. See Elonis v. United States, ___ U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). The Court did not reach the First Amendment question in Elonis, but rejected a negligence standard for threats on statutory construction grounds. See Id. at 2012. The Court's holding

relied heavily on due process considerations which are equally applicable in Washington. See Id. at 2009-11.

In sum, this Court should reject the negligence standard in light of Black and Elonis. It should hold that a person may not be convicted of issuing a “true threat” unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death.

c. A mens rea of negligence is insufficient under the First Amendment and *Virginia v. Black*.

Virginia v. Black involved consolidated cases in which three defendants were convicted of the crime of cross-burning with the intent to intimidate. Black, 538 U.S. at 347-48. Although the Virginia statute at issue required the prosecution to prove subjective intent to cause fear, it also provided that “burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” Id. at 348.

This presumption made sense in light of the history of cross burning in this country. “Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan[,]” a group that “imposed a veritable reign of terror throughout the South.” Id. at 352-53 (internal quotations omitted). “Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence.” Id. at 354. The victims in Black felt “terrible” and “very nervous,” because “a cross

burned in your yard ... tells you that it's just the first round.” Id. at 349-50. In addressing the constitutionality of the statute, the Court reiterated that because the First Amendment protects freedom of speech, only true threats may be criminalized. The Court stated, “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Black, 538 U.S. at 359 (emphasis added). The Court held that Virginia could ban “cross burning with intent to intimidate,” because “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” Id. at 360 (emphasis added).

But the Court struck down the subsection creating a rebuttable presumption that any cross-burning was done with intent to intimidate. Id. at 364 (Four-justice lead opinion); Id. at 380-81 (Three justices would have invalidated the statute in its entirety under the First Amendment). The plurality explained, “The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.” Id. at 367. Although he would have applied a different remedy, Justice Scalia endorsed the pluralitis view that

“a burning cross is not always intended to intimidate,’ and nonintimidating cross burning cannot be prohibited.” Id. at 372 (Scalia, J., concurring in part).

The convictions in Black were reversed even though (1) all of the defendants intentionally burned crosses; (2) the burning crosses caused people to fear harm; and (3) this fear was reasonable in light of the context and history of cross-burning. See Id. at 348-50. The Court concluded that because of the vital values protected by the First Amendment, even making statements that cause fear of violence is protected unless the statements were made with a purpose of causing that fear. Id. at 360. This Court should impose a similar requirement in Washington in order to comport with the First Amendment and Black.

d. Other courts have abandoned the negligence standard in light of *Black*.

Other courts have had the opportunity to reassess the true-threat standard in light of Black, and have renounced the objective (negligence) standard previously used in favor of a subjective (intent) requirement.

The Tenth Circuit engaged in a particularly thorough analysis in Heineman. There, the defendant was charged with the crime of “sending an interstate threat” after he e-mailed a frightening message to a professor. Id. at 971-72. The defendant requested a jury instruction that “the

government must prove that the defendant intended the communication to be received as a threat.” Id. at 972. After the trial court rejected the request, the defendant moved to dismiss, arguing the statute violated the First Amendment if it did not require proof that “the defendant intended to place the hearer in fear of bodily harm or death.” Id.

Although the district court denied the defendant’s motions, the circuit court agreed with his position and reversed. Heineman, 767 F.3d at 971. The court rejected the government’s reliance on prior Tenth Circuit opinions, because those decisions either pre-dated Black or did not raise the issue of whether a new true-threat standard was required in light of Black. Id. at 973-74. The court explained, “we are facing a question of first impression in this circuit: Does the First Amendment, as construed in Black, require the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened? We conclude that it does.” Id. at 975.

The court acknowledged the complexity of Black, but found, “a careful review of the opinions of the Justices makes clear that a true threat must be made with the intent to instill fear.” Heineman, 767 F.3d at 976. It noted that a majority of the Court described true threats as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence” and that the majority also said,

“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” Id. (quoting Black, 538 U.S. at 359-60).

The Tenth Circuit recognized that only four justices held the prima facie provision of the statute was “overbroad,” but noted that Justice Scalia also endorsed the view that proof of intent to threaten was constitutionally required. Heineman, 767 F.3d at 978. The court explained that another circuit’s rejection of Black made no sense: the Sixth Circuit 9 “said that Black had no need to impose a subjective-intent requirement because the Virginia statute already required that intent.” Id. at 979. But “[i]f the First Amendment does not require subjective intent, how could [The U.S. Supreme Court] invalidate the [Virginia] statute for allowing a jury to find subjective intent on improper or inadequate grounds?” Id. at 980. After also rejecting the Sixth Circuit’s illogical grammatical deconstruction of Black, the Tenth Circuit held:

In short, despite arguments to the contrary, we adhere to the view that Black required the district court in this case to find that defendant intended to instill fear before it could convict him of violating 18 U.S.C. § 875(c).

Heineman, 767 F.3d at 982 (emphasis added).

The Indiana Supreme Court has also read Black to require a subjective standard. Brewington v. State, 7 N.E.3d 946, 963 (Ind. 2014). In other words, the State must prove the speaker intended to place the victim in fear of bodily harm or death. Id. Because of its “strong commitment to protecting the freedom of speech,” the Court imposed a two-pronged approach for future cases:

We therefore hold that “true threat” under Indiana law depends on two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target.

Id.

The Ninth Circuit has similarly held that, following Black, proof of subjective intent to threaten is required under the First Amendment. United States v. Bagdasarian, 652 F.3d 1113, 1116-18 & 1122 (9th Cir. 2011). The court noted that oftentimes an objective element must also be satisfied under the relevant statutes, but in all cases the subjective intent standard must be satisfied as a matter of constitutional law.⁴ Id. at 1117-19.

⁴ Like some of the statutes the Ninth Circuit referenced, Washington’s harassment statute requires proof that the alleged victims feared bodily injury or death and that this fear was reasonable. RCW 9A.46.020(b). This statutory element of course remains in addition to the mens rea required by the First Amendment under Black.

Finally, the Seventh Circuit has construed Black as requiring proof of subjective intent to cause fear. United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008). The court did not have to resolve the issue in Parr because the district court had granted the defendant's request to instruct the jury that it could convict only if Parr "intended his statement to be understood" as a threat. Id. The court acknowledged that Black was somewhat cryptic and "[i]t is possible that the Court was not attempting a comprehensive redefinition of true threats" Id. "It is more likely, however, that an entirely objective definition is no longer tenable." Id. (emphasis added).

The only question the court believed to be open was whether the subjective intent standard should be combined with a requirement of proving the listener's reasonable fear:

[A] standard that combines objective and subjective inquiries might satisfy the constitutional concern: the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker's statement as a threat, and second, whether the speaker intended it as a threat. In other words, the statement at issue must objectively be a threat and subjectively be intended as such.

Parr, 545 F.3d at 500.⁵

⁵ Again, Washington's harassment statute already requires proof that the alleged victim reasonably fear that the threat will be carried out. What is lacking and must be added under the First Amendment is a requirement that the State prove subjective intent to cause such fear.

This Court followed the Seventh Circuit when it initially adopted the objective standard in Williams, 144 Wn.2d at 207-08. See also J.M., 144 Wn.2d at 479 n.4. This Court should again follow that court's lead in recognizing that "an entirely objective definition is no longer tenable." Parr, 545 F.3d at 500. Instead, a true threat is a statement made with subjective intent to cause fear of bodily injury or death. Black, 538 U.S. at 360. Both the statement itself and all relevant "contextual factors" must be considered in determining whether the defendant uttered a true threat. Id. at 367.

- e. A mens rea of negligence is insufficient in light of due process principles as explained in *Elonis*.

Although Black is binding authority on the First Amendment question and compels a subjective-intent standard, it is also worth noting that due process concerns support such a standard. The U.S. Supreme Court construed a federal threat statute in light of due process principles and rejected the negligence standard in Elonis, 135 S.Ct. at 2011.

Anthony Elonis was charged with multiple counts of the federal crime of communicating a threat, after he posted frightening Facebook messages about how he would kill his ex-wife and others. Id. at 2004-07. Elonis explained that he posted the messages for "therapeutic" reasons, to help him "deal with the pain" of divorce. Id. at 2005. Over Elonis's

objection, the trial court gave a jury instruction on “true threat” that applied the same reasonable-speaker (negligence) standard that this Court adopted in Williams. Elonis, 135 S.Ct. at 2006. Elonis was convicted of most of the charges, and he appealed on statutory and First Amendment grounds. See Id.

The Supreme Court did not reach the First Amendment question, but reversed the convictions after holding that due process did not permit a construction of the statute which allowed conviction based on a mens rea of mere negligence. Id. at 2009-12. The Court explained:

Such a “reasonable person” standard is a familiar feature of civil liability in tort law, but is inconsistent with “the conventional requirement for criminal conduct - awareness of some wrongdoing. Having liability turn on whether a “reasonable person” regards the communication as a threat - regardless of what the defendant thinks - “reduces culpability on the all-important element of the crime to negligence, and we “have long been reluctant to infer that a negligence standard was intended in criminal statutes.”

Elonis, 135 S. Ct. at 2011 (internal citations omitted); Cf. State v. Bauer, 180 Wn.2d 929, 936-37, 329 P.3d 67 (2014) (declining to import causation standard from tort law because “criminal law and tort law serve different purposes” and “the consequences of a determination of guilt [in criminal cases] are more drastic”).

The Sixth Circuit further explained the due-process problems with the negligence standard in United States v. Houston, 792 F.3d 663, 667-68

(6th Cir. 2015). There, the defendant was upset about the fact that his defense attorney foreclosed on part of his property after he failed to pay for the lawyer's services. Id. 665. A jail guard overheard the defendant say, "When me and my brother get out, we're going to go to that law firm and kill every last one of them." Id. The next day, the defendant called his girlfriend. He told her, "I'll kill that [expletive] when I get out. Hey, I ain't kidding! ... When I get out of this, ... he's dead!" Id. He continued to rant about his plan to kill the lawyer, and urged his girlfriend to tell his family members they had his "permission" to kill him. Id. at 665-66. The girlfriend responded that no one was going to kill anybody. Id. at 666.

The telephone call had been recorded, and the defendant was charged with crimes for these statements. Id. The trial court instructed the jury on the definition of "true threat" using the objective standard. Id.

Following Elonis, the Court of Appeals reversed. Houston, 792 F.3d at 666-68. The court reiterated the principle that "[i]nstead of permitting liability to turn on mere negligence - how acts 'would be understood by a reasonable person'- criminal statutes presumptively require 'awareness of some wrongdoing.'" Id. at 666 (quoting Elonis, 135 S. Ct. at 2011) (emphasis in original). After citing additional sections of Elonis, the court contributed its own analysis to the issue:

And having liability turn on a “reasonable person” standard, we would add, permits criminal convictions premised on mistakes - mistaken assessments by a speaker about how others will react to his words. If a legislature wishes to criminalize negligent acts - and especially negligent utterances - it should say so explicitly; the criminalization of “threats” in “interstate commerce” does nothing of the sort.

Houston, 792 F.3d at 667.

Although the issue had been raised for the first time on appeal, the court reversed in light of “the importance of state-of-mind instructions in ‘threat’ cases” as well as “the oddity of permitting a criminal conviction to stand based on a reasonable-person- which is to say, negligence – standard.” Id. at 668. And as to Houston’s case specifically, the reduced burden on the mens rea was not harmless: “Recognizing that Houston was speaking with his girlfriend, a jury could reason that he was venting his frustration to a trusted confidante rather than issuing a public death threat to another.” Id. at 667-68.

The due process principles relied on in Elonis are equally applicable in Washington. See, e.g., State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). Furthermore, the First Amendment provides special protection against the criminalization of speech. See Black, 538 U.S. at 358. In light of these twin constitutional concerns, this Court should hold that a person may not be convicted of issuing a “true threat”

unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death.

- f. Hakizimana's case demonstrates the importance of adopting a subjective intent standard.

What happened in the case at hand demonstrates the importance of protecting the rights of free speech and due process, and the necessity of abandoning the negligence standard in this state.

Hakizimana was a refugee from Burundi who came to live with Renzaho's family just three weeks before the alleged incident. RP 119. He did not speak English and had never met the family before moving in with them. RP 120, 211-12, 232, 257-58. When Hakizimana recounted a dream involving a family and sexual assault he assured Renzaho that he would never do anything similar to her. RP 124-25.

Although on the day of the incident Hakizimana stated that he was going to kill "somebody" and burn down the house, by Renzaho's own admission, Hakizimana did not threaten her. RP 138, 144-46, 261-62. Renzaho did not even leave the house after the statements were made. RP 147.

It was not until Hakizimana washed a knife that Renzaho had just used to prepare food that she left the house with her children. RP 132, 138. Hakizimana however did not move toward Renzaho with the knife or

make any threatening gestures. RP 132-33, 139, 149-50. As defense counsel noted in arguing the motion to arrest judgment, there was no evidence as to what Hakizimana's subjective intent was in touching and washing the knife. RP 409-10, 413-14.

The trial judge's own comments in denying the motion to arrest judgment further demonstrate the problem with this outcome. The trial court repeatedly recognized that Hakizimana's act of washing the knife was inconsistent with someone who intended to use the knife to commit an assault. RP 417-19, 421-22. As the trial court explained:

It seems to me if he would have just picked up the knife and turned around, I'd feel a little bit more comfortable with my ruling. But the stop and wash it, that really – so, I guess, I want each one of you – I know what [defense counsel's] going to say – but don't you think that that adds some credibility to [defense counsel's] argument about what the intent of Mr. Hakizimana was?...I don't know how I'm going to rule. I mean, I haven't made up mind. I wanted to hear the argument because I thought long and hard about this case.

RP 418-19.

The rights to freedom of expression and due process are too precious to permit criminal liability for speech under a civil negligence standard. This Court should hold that a person may not be convicted of issuing a "true threat" unless the State proves the speaker subjectively intended to place the victim in fear of bodily harm or death. An

independent review of the facts leads to the conclusion that Hakizimana did not subjectively intend to place Renzaho in fear of death. Reversal is required because the State failed to prove beyond a reasonable doubt that Hakizimana made a true threat that was unprotected speech.

- g. The trial court erred in denying Hakizimana's motion to arrest judgment where the State failed to present sufficient evidence.

Under CrR 7.4(a)(3),⁶ a defendant may bring a motion for arrest of judgment for “insufficiency of the proof of a material element of the crime.” In ruling on a motion to arrest judgment, the trial court does not weigh the evidence, but only examines the sufficiency thereof. State v. Coleman, 54 Wn. App. 742, 746, 775 P.2d 986 (sufficiency of the evidence is legally the same issue as insufficiency of the proof of a material element of the crime), rev. denied, 113 Wn.2d 1017 (1989). In reviewing a trial court's decision on a motion for arrest of judgment, this Court applies the same standard as the trial court: that is, whether there is sufficient evidence that could support a verdict. State v. Longshore, 97

⁶ The rule provides in relevant part:

(c) New Charges After Arrest of Judgments. When judgment is arrested and there is reasonable ground to believe that the defendant can be convicted of an offense properly charged, the court may order the defendant to be recommitted or released to answer a new indictment or information. If judgment was arrested because there was no proof of a material element of the crime the defendant shall be dismissed.

Wn. App. 144, 147, 982 P.2d 1191 (1999), aff'd, 141 Wn.2d 414, 5 P.3d 1256 (2000). Evidence is sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt. Id.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Hakizimana committed the elements of the offenses of which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The same is true of convictions obtained in violation of the First Amendment. Kilburn, 151 Wn.2d at 54. Double Jeopardy prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 28 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969)). The appropriate remedy for the errors in this case is reversal of the conviction and dismissal of the charges with prejudice.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Hakizimana was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 72-74. If Hakizimana does not prevail on appeal, he asks that no costs of appeal be

authorized under title 14 RAP. State v. Sinclair⁷ (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant’s brief). RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State’s request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Hakizimana’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees, and only reluctantly imposed mandatory fees, explaining “I don’t really want to” but “the law requires me to”. RP 433; CP 66.

Moreover, as in Sinclair, here several facts show Hakizimana does not have the present, or future ability, to pay appellate costs. Hakizimana is a refugee from Burundi who had only been in the United States for

⁷ State v. Sinclair 192 Wn. App. 380, 367 P.3d 612, rev. denied, 185 Wn.2d 1034, 377 P.3d 733 (2016).

about three weeks at the time of the incident. RP 119-20. He does not speak English and has no hands. RP 120, 210-12, 232, 246, 257-58, 278, 304. In his motion and declaration for an order of indigency, Hakizimana indicated that he owns no real or personal property and has no employer. Supp. CP ____ (sub no. 47, Declaration, dated 2/22/16). His only source of income is social security disability insurance. Id. As in Sinclair, here there is no evidence which would rebut the “presumption of continued indigency throughout review.” Sinclair, 192 Wn. App. at 394.

Without a basis to determine that Hakizimana has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

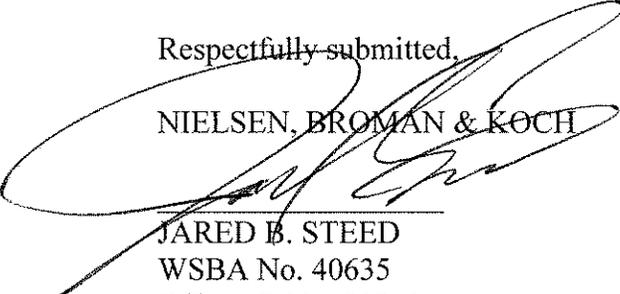
D. CONCLUSION

For reasons stated above, this Court should reverse Hakizimana’s conviction and dismiss the charge with prejudice. This Court should also decline to impose appellate costs against Hakizimana.

DATED this 20th day of September, 2016.

Respectfully submitted,

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