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COURT OF APPEALS

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STATE OF WASHINGTON

BY _____
TITLE _____

No. 33633-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Eric Joseph Brown,

Appellant.

Lewis County Superior Court

Cause No. 03-1-00409-4

The Honorable Judge Christine Pomeroy

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court failed to instruct the jury on the proper legal standard for distinguishing “true threats” from “idle talk.”
2. The court’s instructions did not require the jury to examine the context and circumstances under which the statements were made.
3. The court’s instructions did not require the jury to evaluate Mr. Brown’s statements using a reasonable person standard.
4. The court’s instructions allowed the jury to convict Mr. Brown even if his statements were protected speech.
5. Mr. Brown was denied the effective assistance of counsel.
6. Mr. Brown’s attorney was ineffective for failing to propose an instruction conveying the objective standard required for distinguishing “true threats” from “idle talk.”
7. The conviction was based on insufficient evidence that Mr. Brown communicated an intent to cause harm in the future.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Eric Brown was charged with intimidating a judge, based on statements he made to a collection agent. He told the collection agent that he had tried to kill himself, that he had shot the wall of his residence, and that he had thought about shooting the judge and his family, who lived within sight of his home.

The court's instructions to the jury did not convey the objective standard required for distinguishing "true threats" from constitutionally protected "idle talk." His attorney did not propose such an instruction.

At trial, Mr. Brown did not dispute that he'd made the statements. Instead, his attorney argued that the statements were never intended to be taken seriously, and that they were statements of past thoughts, not of any future intent to cause harm.

1. Did the court's instructions relieve the state of its burden to establish that Mr. Brown's statements constituted "true threats" as opposed to constitutionally protected "idle talk?" Assignments of Error Nos. 1, 2, 3, 4.
2. Did the court's instructions fail to convey the objective standard for distinguishing "true threats" from constitutionally protected "idle talk?" Assignments of Error Nos. 1, 2, 3, 4.
3. Was Mr. Brown denied the effective assistance of counsel? Assignments of Error Nos. 5, 6.
4. Was defense counsel ineffective for failing to propose an instruction that conveyed the objective standard for distinguishing "true threats" from constitutionally protected "idle talk"? Assignments of Error Nos. 5, 6.
5. Was Mr. Brown's conviction based on insufficient evidence of intent to cause harm in the future? Assignment of Error No. 7.

**SCOPE OF REVIEW, STANDARD OF REVIEW, AND
HARMLESS ERROR**

1. The absence of an instruction conveying the objective standard for distinguishing “true threats” from “idle talk” is a manifest error affecting Mr. Brown’s constitutional rights to free speech and due process, and thus may be raised for the first time on review. An instructional error is examined *de novo*, and requires reversal unless it can be shown beyond a reasonable doubt that it did not contribute to the verdict. Issues 1 and 2.

2. Ineffective assistance of counsel is a manifest error affecting Mr. Brown’s rights under the Sixth Amendment, and may be raised for the first time on review. Ineffective assistance is reviewed *de novo*, and requires reversal if there is a reasonable probability that the error affected the verdict. Issues 3 and 4.

3. The sufficiency of the evidence may be raised for the first time on review. A claim of insufficiency admits the truth of the state’s evidence and all inferences that can reasonably be drawn therefrom. Reversal is required where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. Issue 5.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On May 12, 2005, Eric Brown contacted Dynamic Collections Agency to resolve his debt in order to reinstate his driver's license. RP (7-6-05) 14-15. He complained that his DUI conviction and sentence were unfair and had caused problems for him. RP (7-6-05) 15-17. He also said that he had tried unsuccessfully to shoot himself, had shot the wall in his house, and, according the Melissa Knee of the Dynamic Collections:

...then he had made a comment about the person who – or the reason why he was in this mess was because the judge that he had seen for the case for his ticket, that he could see his door from his front porch and that the judge could see his door, and that he had seen not only the judge but his wife and his kids out in the front lawn, and had thought about shooting them before.

RP (7-6-05) 16.

Based on this statement, Eric Brown was charged with Intimidating a Judge on May 13, 2005. CP 12. The case proceeded to jury trial. Mr. Brown did not contest that he had made the statements, but argued that the statements were idle talk, and didn't establish intent to harm anyone in the future. RP (7-7-05) 39-48.

The court gave the following definition of threat to the jury:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person or to do any other act which is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition or personal relationships.

Supp. CP, Court's Instruction No. 7.

The court did not instruct the jury that it was required to find a "true threat" instead of constitutionally protected "idle talk;" nor did it give any additional instructions conveying the objective standard for differentiating between the two.

Mr. Brown was convicted and sentenced under the first time offender option. CP 4-11. This timely appeal followed. CP 3.

ARGUMENT

I. THE COURT'S INSTRUCTIONS FAILED TO CONVEY TO THE JURY THE OBJECTIVE STANDARD FOR DISTINGUISHING BETWEEN "TRUE THREATS" AND CONSTITUTIONALLY PROTECTED "IDLE TALK."

A. The court's instructions relieved the state of its burden of proof on an essential element of the offense.

Under RCW 9A.72.160(1), a person is guilty of intimidating a judge if she or he "directs a threat to a judge because of a ruling or decision of the judge in any official proceeding." To avoid First Amendment problems, statutes criminalizing threats have been interpreted to require that the threats be "true threats." *See, e.g., Watts v. U.S.*, 394 U.S. 705, 89 S.Ct. 1399 (1969); *see also State v. J.M.*, 144 Wn.2d 472 at 478, 28 P.3d 720 (2001). 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. A true threat is a serious threat, not one said in jest, idle talk, or political argument. [W]hether a true threat has been made is determined under an objective standard that focuses on the speaker. *State v. Kilburn*, 151 Wn.2d 36 at 43-44, 84 P.3d 1215 (2004), *citations and quotation marks omitted*.

The existence of a “true threat” is an essential element that must be established by proof beyond a reasonable doubt. *See Kilburn, supra*, at 54 (the prosecution must “satisfy both the First Amendment demands-- by proving a true threat was made-- and the statute, by proving all the statutory elements of the crime.”)

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005).

In this case, the jury was instructed in relevant part that “[t]hreat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person...”

Instruction No. 7, Supp. CP. The jury was not given an additional instruction conveying the objective standard required by the First Amendment. As a result, none of the instructions asked the jury to examine the context, circumstances, or perceived seriousness of Mr. Brown's statements; nor were they told to apply a "reasonable person" standard to determine whether these factors merited classifying his statements as a "true threat." Nothing in the instructions conveyed the requirement that Mr. Brown's statements were "true threats;" instead, the jury was permitted to convict even if it thought Mr. Brown's statements were "idle talk." See Court's Instructions, Supp. CP. Because of this, the conviction runs afoul of the "true threat" requirement enunciated in *Watts*, *supra*, and its progeny.¹

Although not raised below, this issue is within the scope of review because it is a manifest error affecting Mr. Brown's constitutional rights to free speech (under the First Amendment) and due process (under the

¹ The "true threat" requirement should have been included in the "to convict" instruction, since that instruction functions as the "yardstick" against which the jury measures a defendant's guilt. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). However, since Mr. Brown's attorney proposed an instruction lacking this element, the absence of the required language in the "to convict" instruction is invited error. Since defense counsel's erroneous instruction was based on a standard WPIC, the error is not ineffective assistance. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

Fourteenth Amendment.) RAP 2.5(a); U.S. Const. Amend I; U.S. Const. Amend. XIV; *Watts, supra*; *Randhawa, supra*. Furthermore, it is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

B. Division I's 1991 decision in *State v. Kepiro* was wrongly decided.

In *State v. Kepiro*, Division I found the statutory language (upon which Instruction No. 7 is based) adequate to protect an accused's First Amendment rights: "A comparison of the federal definition of 'true' threat with the definition of threat contained in [the statute] reveals no significant differences in core substantive language..." *State v. Kepiro*, 61 Wn.App. 116 at 125, 810 P.2d 19 (1991).

But *Kepiro* was wrongly decided. This is easily seen by testing it with the idle threat at issue in *Watts, supra*. In that case, the defendant, an opponent of the war in Vietnam, made the following statement 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."² *Watts, supra*, 394 U.S. at 706. Applying the *Kepiro* test, this statement would be a "true threat" because it falls within

² Such conditional threats can form the basis for a criminal prosecution in Washington. *State v. Edwards*, 84 Wn.App. 5 at 12, 924 P.2d 397 (1996).

the statute's definition of threat: "to communicate, directly or indirectly the intent: (a) To cause bodily injury in the future to the person threatened or to any other person..." *Kepiro*, at 125. But the U.S. Supreme Court's *per curiam* decision in *Watts* made it clear that this statement was protected speech and *not* a true threat. *Watts, supra*.

Furthermore, *Kepiro* was decided prior to the Supreme Court's *Kilburn* decision. In *Kilburn*, the Court made clear that the state must "satisfy both the First Amendment demands-- by proving a true threat was made-- and the statute, by proving all the statutory elements of the crime." *Kilburn, supra, at 54*.

Mr. Brown's conviction for intimidating a judge must be reversed, and the case remanded for a new trial. At the new trial, the instructions must include language informing the jury of the objective standard for determining whether a statement is a "true threat" or simply "idle talk."

II. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE AN INSTRUCTION THAT CONVEYED TO THE JURY THE OBJECTIVE STANDARD FOR DISTINGUISHING BETWEEN "TRUE THREATS" AND CONSTITUTIONALLY PROTECTED "IDLE TALK."

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution

declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland*, *supra*. A strong presumption exists that defense counsel provided adequate assistance. *Holm*, *supra*. Furthermore, the defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Holm*, *supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

In this case, Mr. Brown's attorney failed to propose an instruction conveying the objective standard required to be applied in determining whether a statement is a "true threat." Supp. CP, Defendant's Proposed Instructions. This denied Mr. Brown the effective assistance of counsel.

Mr. Brown did not deny making the statements. Instead, his attorney argued that Mr. Brown never intended that the statements be taken seriously. RP (7-7-06) 3-25, 39-48. But Mr. Brown's subjective intent was irrelevant; a reasonably competent attorney would have been

familiar with the objective standard set forth in *Kilburn, supra*, and would have proposed an instruction containing that language.

Without an instruction informing them of the objective standard for evaluating a statement, the jury was permitted to convict Mr. Brown if he made statements that qualified as threatening, whether or not the statements were “idle talk” protected by the First Amendment. There is a reasonable probability that the jury would have acquitted Mr. Brown had they evaluated the statements using a reasonable person standard and examining the context and circumstances under which the statements were made. Because of this, Mr. Brown was denied the effective assistance of counsel. *Strickland*. His conviction must be reversed, and the case remanded for a new trial.

III. MR. BROWN’S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE OF AN INTENT TO CAUSE HARM IN THE FUTURE.

The sufficiency of the evidence may be raised for the first time on review. *State v. Hickman*, 135 Wn.2d 97 at 103 n. 3, 954 P.2d 900 (1998). A claim of insufficiency admits the truth of the state’s evidence and all reasonable inferences therefrom. *State v. Rooth*, ___ Wn. App. ___, 121 P.3d 755 at 761 (2005). Reversal is required where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. *State v. Smith*, ___ Wn.App. ___ 120 P.3d 559 at 561 (2005).

As previously noted, a person is guilty of intimidating a judge if she or he “directs a threat to a judge because of a ruling or decision of the judge in any official proceeding.” RCW 9A.72.160(1). Threat means (in relevant part) “to communicate, directly or indirectly, the intent to cause bodily injury in the future...” Instruction No. 7, Supp. CP.

Mr. Brown’s conviction rests on his statement that he had previously thought about harming the judge and members of his family. But this statement, even when taken in a light most favorable to the state, does not establish any intent to cause bodily injury in the future. Nor can such intent reasonably be inferred from the statement; were this not so, a person could be convicted simply for confessing to her or his past thoughts of violence. Because of this, the evidence was insufficient to convict Mr. Brown of intimidating a judge. The conviction must be reversed and the case dismissed with prejudice. *State v. Smith, supra*.

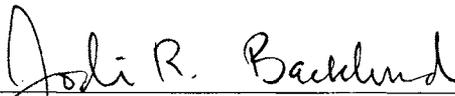
CONCLUSION

The evidence was insufficient to establish that Mr. Brown communicated an intent to cause bodily injury in the future. Because of this the conviction must be reversed and the case dismissed with prejudice.

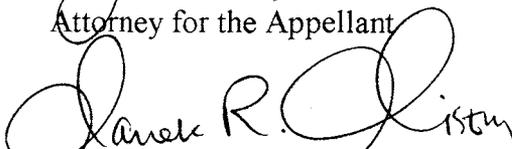
In addition, the court's instructions permitted a conviction based on constitutionally protected speech, and his attorney's failure to propose an instruction preventing this denied Mr. Brown the effective assistance of counsel. These errors require reversal of the conviction and remand for a new trial.

Respectfully submitted on January 13, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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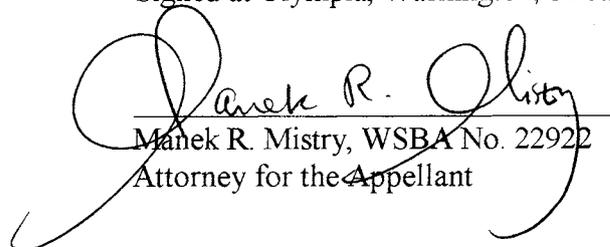
And to the office of the Lewis County Prosecutor,

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 13, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington, on January 13, 2006.


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

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