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STATE OF WASHINGTON
BY

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 Reply Brief

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ARGUMENT

I. THIS CASE IS CONTROLLED BY THE RECENT SUPREME COURT DECISION IN *STATE V. JOHNSTON*, WHICH REQUIRES A SPECIFIC INSTRUCTION DEFINING "TRUE THREATS."

A. *State v. Johnston* requires reversal of Mr. Brown's conviction.

In January 2006, the Washington Supreme Court decided *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006).[1] The Court reversed the defendant's conviction for making a bomb threat, holding that instructions failing to define a "true threat" are inadequate to protect against unconstitutional verdicts. *Johnston,* at 366.

In *Johnston*, the instruction at issue defined threat to mean "to communicate, directly or indirectly, the intent to wrongfully cause physical damage to the property of a person other than the actor." *Johnston* at 358. Because this definition did not include language explaining that the defendant could only be convicted for making a "true threat," the court found it to be inadequate:

> We construe the bomb threat statute, RCW 9.61.160, to apply only to true threats. Construed in this way, the statute is not unconstitutionally overbroad. We hold that the jury instructions given at trial were insufficient to ensure a constitutional verdict.

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[1] The Court's opinion was issued after Appellant's Opening Brief, but several months before the Brief of Respondent was filed. Respondent fails to address *Johnston*.

> and the instructional error cannot be deemed to be harmless beyond a reasonable doubt. Accordingly, we reverse the Court of Appeals and remand this case for a new trial with directions that the jury must be instructed that a conviction under RCW 9.61.160 requires a true threat and must be instructed on the meaning of a true threat.
> *Johnston*, at 366.

Johnston reaffirmed that a true threat is one 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 an intention to inflict bodily harm upon or to take the life of [another individual]." *Johnston*, at 361, *citations omitted.* Under *Johnston,* the jury must be instructed with this language to prevent unconstitutional verdicts that violate the First Amendment's protection of free speech. U.S. Const. Amend. I; *Johnston,* at 366.

The Supreme Court's decision in *Johnston* controls Mr. Brown's case. First, although *Johnston* dealt with a bomb threat, it relied on cases addressing threats in other contexts, and did not limit its analysis to the bomb threat statute. *See e.g., Johnston, supra, at* 360 (*citing State v. Williams,* 144 Wn.2d 197, 26 P.3d 890 (2001) and *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004), *and at* 361 (*citing State v. J.M.*, 144 Wn.2d 472, 28 P.3d 720 (2001)).

Second, the faulty instruction in *Johnston* was substantially the same as the instruction used here. *Compare* Instruction No. 7, Supp. CP ("[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...") *with* Instruction No. 2.02 in *Johnston* (*at* 358) ("[t]hreat means to communicate, directly or indirectly, the intent to wrongfully cause physical damage to the property of a person other than the actor.")

Third, the required instruction defining "true threat" was absent from this case, as it was in *Johnston.* Instructions, Supp. CP. The absence of such an instruction permitted the jury to convict in the absence of a true threat, in violation of Mr. Brown's constitutional right to free speech.

Mr. Brown's conviction must be reversed, and the case remanded for a new trial. At the trial, the jury must be instructed on the meaning of "true threat," in conformity with the requirements of the First Amendment and *Johnston, supra.*

B. Division I's 1991 decision in *State v. Kepiro* has been effectively overruled by *State v. Johnston.*

In 1991, Division I found the statutory language defining threat adequate to protect an accused's First Amendment rights. *State v. Kepiro*, 61 Wn.App. 116 at 125, 810 P.2d 19 (1991) ("it is implicit in the definition of 'threat' in RCW 9A.04.110(25)(a) that only true or serious

threats are covered.") That finding has been repudiated by the Supreme Court:

> [The lower court decision in *Johnston*] conflicts with the United States Supreme Court['s position], our decisions..., and the body of federal case law. RCW 9.61.160 must be limited to true threats, as explained above, and the jury must be instructed accordingly.
> *Johnston*, at 364
> in *Johnston, supra.*

Respondent's continued reliance on *Kepiro* is misplaced, in light of the Supreme Court's decision in *Johnston*. Brief of Respondent, p. 4.

II. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE AN INSTRUCTION DEFINING "TRUE THREATS."

In light of *Johnston, supra,* Mr. Brown stands by the arguments made in the opening brief, which now apply with greater force.

III. MR. BROWN'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE.

Mr. Brown stands by the argument made in the opening brief.

CONCLUSION

The Supreme Court's recent decision in *State v. Johnston, supra,* controls this case and requires reversal.

Respectfully submitted on June 1, 2006.

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STATE OF WASHINGTON
BY
DEPUTY

CERTIFICATE OF MAILING

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

Eric Brown
1115 Locust St.
Centralia, WA 98531

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 June 1, 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 June 1, 2006.

Joel Backlund

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