

NO. 33633-2-II

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY jn
CITY

STATE OF WASHINGTON,
Respondent,

v.

ERIC JOSEPH BROWN
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY

The Honorable Christine Pomeroy, Visiting Judge
Cause No. 05-1-00380-9

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

- A. Jury instructions must properly inform the trier of fact of the applicable law. The jury instruction which defined “threat” conformed to the applicable statute and the WPIC. Did the lower court err in failing to instruct the jury on the definition of a “true threat?”
- B. Trial counsel’s performance is deficient if it falls below an objective standard of reasonableness and affects the outcome of the proceedings. Brown’s trial counsel did not propose a “true threat” instruction. Was his performance deficient?
- C. An appellant who challenges the sufficiency of the evidence admits the truth of the state’s evidence and all rational inferences that may be drawn therefrom. Could a rational trier of fact find Brown guilty of Intimidating a Judge?

II. STATEMENT OF THE CASE

Respondent accepts as adequate, for purposes of this Response, the “Statement of Facts and Prior Proceedings” appearing in the Opening Brief of Appellant, with additions and/or clarifications as appear hereinafter in the body of this Brief of Respondent, and as follows:

On May 12, 2005, Melissa Knee, who works for a collection agency, received a phone call from Eric Brown.¹ Brown was upset

¹ RP 9, 10, 14.

because his court fines from a Driving Under the Influence conviction had been referred to collections, and he wanted to get his driver's license reinstated.² Brown stated that he had tried to shoot himself in the head, but the gun did not fire, and he subsequently shot four holes in the wall.³ Knee tried to steer the conversation back to how Brown could get his license reinstated. Instead, Brown said that he could see the front porch of the judge who had landed him in his financial "mess."⁴ He further stated that he could see the judge's front door from his own front door, and that he could see the judge's wife and kids when they played on the front lawn. He said that he had thought about shooting them.⁵ Although Knee deals with upset persons on a daily basis, Brown's tone of voice and the fact that he said he had a gun, had tried to shoot himself, and had fired four bullets into the wall caused her to report the conversation to her supervisor.⁶

After the incident was reported to the police, Officer Stacy Denham spoke with Brown. Brown admitted to telling Knee that he tried to shoot himself, and that he shot four bullets into the wall, but did not admit to making threats to the Judge. At one point he acknowledged that

² RP 14.

³ RP 16.

⁴ RP 16.

⁵ RP 16.

⁶ RP 24.

it was possible that he made statements about Judge Buzzard in anger, with no intention of following up on those threats.⁷

III. ARGUMENT

- A. JURY INSTRUCTIONS MUST PROPERLY INFORM THE TRIER OF FACT OF THE APPLICABLE LAW. THE JURY INSTRUCTION WHICH DEFINED “THREAT” CONFORMED TO THE APPLICABLE STATUTE AND THE WPIC. DID THE LOWER COURT ERR IN FAILING TO INSTRUCT THE JURY ON THE DEFINITION OF A “TRUE THREAT?”

Brown first asserts that the Court’s Instruction No. 7 shifted the burden of proof to him, because there was not instruction defining a “true threat.” Specifically, he cites the following language from Instruction No. 7: “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...”⁸ He maintains that the lower court should have been given an additional instruction conveying the objective standard—i.e., what constitutes a “true threat.” The fatal flaw with this argument is that the

⁷ RP 53, 59, 62.

⁸ CP 44.

language Brown complains of has been found to constitute a true threat.⁹ If the jury found that Brown made such a threat, it was a true threat. Thus, no additional instruction defining true threat was necessary.

Moreover, the language condemned by Brown was upheld in *State v. Keipiro*.¹⁰ Although Brown asserts that *Keipiro* was wrongly decided, the case has not been overruled. In fact, it has been relied upon numerous times by Washington appellate courts.¹¹ Thus, in light of *Keipiro*'s approval of the language in Instruction No. 7, and the fact that *Keipiro* is sound authority therefor, Brown's claim must fail.

B. TRIAL COUNSEL'S PERFORMANCE IS DEFICIENT IF IT FALLS BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND AFFECTS THE OUTCOME OF THE PROCEEDINGS. BROWN'S TRIAL COUNSEL DID NOT PROPOSE A "TRUE THREAT" INSTRUCTION. WAS HIS PERFORMANCE DEFICIENT?

The law regarding ineffective assistance of counsel is well established. To prevail on a claim of ineffective assistance of counsel, a defendant must show both ineffective representation and resulting

⁹ *State v. Kilburn*, 151 Wn.2d 36, 47, 84 P.3d 1215 (2004); citing *State v. Williams*, 144 Wn.2d 197, 208, 26 P.3d 890 (2001).

¹⁰ 61 Wn.App. 116, 124, 810 P.2d 19 (1991).

¹¹ See e.g., *State v. Avila*, 102 Wn.App. 882, 892-3, 10 P.3d 486 (2000) [Div. III]; *State v. Side*, 105 Wn.App. 787, 790, 21 P.3d 321 (2001) [Div. III]; *State v. Stephenson*, 89 Wn.App. 794, 799, 950 P.2d 38 (1998) [Div. II]; *State v. Edwards*, 84 Wn.App. 5, 13,

prejudice.¹² To satisfy the first prong, a defendant must show that counsel's performance fell below an objective standard of reasonableness.¹³ To satisfy the second prong, a defendant must establish that counsel's performance was so inadequate that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁴ A reasonable probability is a probability sufficient to undermine confidence in the outcome.¹⁵

There is a strong presumption that counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions.¹⁶ Furthermore, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong.¹⁷

Here, Brown argues that his trial counsel's performance was deficient because he did not propose a "true threat" instruction. Based on the argument appearing in Section III A above, no such instruction was

924 P.2d 397 (1996) [Div. II]; *State v. Hansen*, 67 Wn.App. 511, 515, 837 P.2d 651 (1992) [Div. I].

¹² *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn.App. 44, 56, 896 P.2d 704 (1995).

¹³ *Strickland v. Washington*, 466 U.S. 668, 693, 80 L.Ed 2d 674, 104 S.Ct 2052 (1984); *State v. Sardinia*, 42 Wn.App. 533, 540, 713 P.2d 1302 (1978).

¹⁴ *Strickland*, 466 U.S. at 694.

¹⁵ *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

¹⁶ *Strickland*, 466 U.S. at 689.

¹⁷ *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

required, as the specific language Brown complains of has been determined to constitute a true threat. Thus, a “true threat” instruction would likely have been rejected if proposed, and the failure to propose such an instruction cannot render Brown’s trial counsel’s performance deficient.

C. AN APPELLANT WHO CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ADMITS THE TRUTH OF THE STATE’S EVIDENCE AND ALL RATIONAL INFERENCES THAT MAY BE DRAWN THEREFROM. COULD A RATIONAL TRIER OF FACT FIND BROWN GUILTY OF INTIMIDATING A JUDGE?

Finally, Brown challenges the sufficiency of the evidence resulting in his conviction. Appellate courts review a challenge of insufficient evidence in the light most favorable to the State to determine “whether ... any rational trier of fact could have found guilt beyond a reasonable doubt.”¹⁸ “The court may infer criminal intent from conduct.”¹⁹ “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”²⁰ “A claim of

¹⁸ *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

¹⁹ *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

²⁰ *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.”²¹ The reviewing court considers circumstantial evidence equally reliable as direct evidence.²² “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.”²³

“[T]he elements required to be proven under RCW 9A.72.160(1) are: (1) that a person directs a threat, either directly or indirectly; (2) to a judge; and (3) because of a ruling or decision by that judge in any official proceeding.”²⁴

Taking the evidence in the light most favorable to the State, and leaving credibility determinations to the jury, sufficient evidence existed to support Brown’s conviction. The elements are established by Brown’s statement to Melissa knee that he had considered shooting the judge and his wife and children. This satisfies both the first element, as it was a threatening statement made indirectly, i.e., to a third party, and the second element, since the judge was one of the objects of the threat. The third element is proven by the fact that Brown made the threat because of Judge Buzzard’s earlier official action when Brown was convicted of Driving

²¹ *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

²² *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

²³ *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

²⁴ *State v. Hansen*, 122 Wn.2d 712, 719, 862 P.2d 117 (1993).

Under the Influence, and assessed fines, which later were sent to collections.

Although the threat in this case was not an explicit statement that Brown was going to harm or kill the judge, a rational trier of fact could find that the combination of his statements: That he blamed the judge for his predicament; that he had a clear shot at the judge and his wife and children; that he had a gun which he had already fired at himself and at his walls; that he had nothing to lose (as evidenced by his suicide attempt); and that he had considered shooting the judge or his wife and children, constituted a threat. As the state argued in its closing argument, his statement that he had thought about shooting the judge's wife and kids cannot be viewed in a vacuum. It must be construed in a light most favorable to the State, and in the context of complaining about the financial "mess" he was in, and the result he was attempting to bring about—i.e., getting the collections agency to cooperate with his reinstating his driver's license, the statements constituted a threat.

Thus, viewing the evidence most favorably to the prosecution, a rational trier of fact could find all the elements of RCW 9A.72.160(1) beyond a reasonable doubt. Therefore, there was sufficient evidence introduced at trial to prove that Brown was guilty of intimidating a judge under RCW 9A.72.160.

IV. CONCLUSION

No “true threat” instruction was necessary, because the language cited by Brown in the lower court’s instructions is recognized as constituting a true threat. Thus, Brown’s counsel’s performance was not deficient because he failed to propose such an instruction. Brown’s words to Melissa Knee constituted a threat to Judge Buzzard given the context in which they were delivered and the rational inference as to their meaning. Accordingly, his appeal should be denied.

V. REQUEST FOR COSTS

Should this Court determine that the State substantially prevails in this matter, the State requests that Brown be required to pay all taxable costs of this appeal, pursuant to RAP Title 14.

Respectfully submitted this 8th day of May, 2006.

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By:


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CERTIFICATE

I certify that on 5/8/06, I mailed a copy of the foregoing supplemental response by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

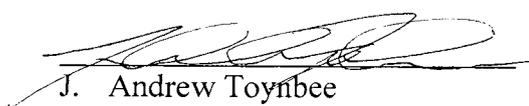
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