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A. ASSIGNMENTS OF ERROR

1. Improper jury instructions deprived Mr. Caracciolo of his right to a fair trial.
2. The State presented insufficient evidence to convict Mr. Caracciolo of making a threat to bomb.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a defendant receive a fair trial where the jury is not properly instructed on the applicable law? (Assignment of Error No. 1)
2. Does the State present sufficient evidence to convict a defendant of threatening to bomb where the State presents insufficient evidence to establish that the threat made was a “true threat”? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

Around 12 a.m. on August 2, 2007, Mr. Caracciolo entered the QFC off of Kitsap Way in Bremerton, Washington. RP 28-31. Mr. Allan Farmer, the manager of the QFC, saw Mr. Caracciolo and observed that Mr. Caracciolo was very intoxicated and unable to walk in a straight line. RP 31-32. Mr. Caracciolo was obviously drunk. RP 39.

Mr. Caracciolo attempted to purchase several single beers but Mr. Farmer refused to sell the beer to Mr. Caracciolo because Mr. Caracciolo was “very intoxicated.” RP 32. Mr. Caracciolo was upset by Mr. Farmer’s refusal to sell him beer and said that he was going to “kick [Mr.

Farmer's] ass." RP 32. Mr. Farmer ignored Mr. Caracciolo and began helping other customers who were in the store. RP 33. Mr. Caracciolo continued to taunt Mr. Farmer and other customers, saying that he would kick Mr. Farmer's ass and kick the customers' asses. RP 33-34.

Mr. Caracciolo continued taunting and at some point said that he was going to blow up the store. RP 34. Mr. Farmer asked Mr. Caracciolo what he had said and Mr. Caracciolo repeated that he was going to blow up the store and that he was going to use the propane and fertilizer which was outside the store. RP 34. However, what Mr. Caracciolo thought was fertilizer was actually beauty bark. RP 41. Mr. Farmer responded by telling Mr. Caracciolo to leave the store and calling 911. RP 35-36.

While Mr. Farmer was on the phone with the police, Mr. Caracciolo exited the store and walked down the street away from the store. RP 36-37.

Mr. Farmer told the 911 operator that Mr. Caracciolo was leaving the store and the operator told Mr. Farmer to call her back if the situation changed. RP 41-42. Mr. Farmer called the 911 operator back and informed her that Mr. Caracciolo was walking away from the QFC and that Mr. Caracciolo was "in bad shape," "wasn't doing so hot," and was "stumbling and bumbling." RP 42. Mr. Caracciolo's condition was so bad that Mr. Farmer suggested to the 911 operator that the police might want to send someone to check on Mr. Caracciolo. RP 42.

At 12:35 am on August 2, 2007, Washington State Patrol Sergeant Mead responded to a call of someone staggering in the roadway on Kitsap Way. RP 52. Sgt. Mead responded to the scene and people pointed out Mr. Caracciolo as the person who had been staggering in the street. RP 52-53.

Sgt. Mead contacted Mr. Caracciolo and Mr. Caracciolo to be intoxicated and exhibiting badly slurred speech. RP 53-54. In his report, Sgt. Mead wrote in bold print that Mr. Caracciolo was “highly intoxicated” and underlined it as well. RP 54. Sgt. Mead determined that Mr. Caracciolo was not a threat to himself and let him go. RP 54-55.

After releasing Mr. Caracciolo, Sgt. Mead heard over the radio about the events at the QFC and realized that Mr. Caracciolo matched the description of the suspect in the QFC events. RP 55. Sgt. Mead and another trooper took Mr. Caracciolo back into custody and transported him to the QFC. RP 55-56.

About 20 minutes after Mr. Farmer called the police, police arrived at the QFC. RP 38. A few minutes after the police arrived, more police brought Mr. Caracciolo back to the QFC in the back of a police car. RP 38.

On August 2, 2007, Mr. Caracciolo was charged with one count of making a threat to bomb or injure property. CP 1-5.

The jury found Mr. Caracciolo guilty. RP 94-96.

Notice of appeal was timely filed on December 7, 2007. CP 38-49.

D. ARGUMENT

1. Faulty jury instructions deprived Mr. Caracciolo of a fair trial.

The due process clauses of both the federal and Washington constitutions guarantee a defendant the right to a fair trial. An erroneous instruction that may have affected a criminal defendant's constitutional right to a fair trial may be considered for the first time on appeal. *See State v. Hanna*, 123 Wn.2d 704, 709, 871 P.2d 135, *cert. denied* 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed2d 212 (1994); *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); RAP 2.5(a).

Mr. Caracciolo was charged with making a threat to bomb or injure property in violation of RCW 9.61.160. CP 1-5.

RCW 9.61.160 provides,

(1) It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

(2) It shall not be a defense to any prosecution under this section that the threatened bombing or injury was a hoax.

(3) A violation of this section is a class B felony punishable according to chapter 9A.20 RCW.

The Washington Supreme Court has held that RCW 9.61.160 is unconstitutionally overbroad as prohibiting free speech unless the jury is given a limiting instruction which clarifies that the statute only applies to “true threats.” *State v. Johnston*, 156 Wn.2d 355, 362-364, 127 P.3d 707 (2006).

Washington has adopted the test for determining whether or not a threat is a “true threat” set forth in *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990). *Johnston*, 156 Wn.2d at 360-361, 127 P.2d 707. “A true threat is a statement 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 take the life of another individual.” *Johnston*, 156 Wn.2d at 360-361, 127 P.2d 707, *citing Khorrami*, 895 F.2d at 1192.

Put another way, “Whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant’s place would foresee that in context the listener would interpret the statement as a serious threat or a joke.” *State v. Kilburn*, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004).

“Whether a true threat has been made is determined under an

objective standard that focuses on the speaker. A true threat is a serious threat, not one said in jest, idle talk, or political argument.” *Johnston*, 156 Wn.2d at 361, 127 P.2d 707, *citing State v. Kilburn*, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004). “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.” *Johnston*, 156 Wn.2d at 361-362, 127 P.2d 707, *citing Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d. 535 (2003).

- a. *Jury instruction no. 6 was an incomplete statement of the law regarding true threats in the context of bomb threats.*

At Mr. Caracciolo’s trial, jury instruction number 6 was intended to be the instruction that defined “threat” for the jury. Instruction number 6 reads as follows:

A threat is a statement meant to communicate, directly or indirectly, to another a serious expression of intent to cause bodily injury in the future to the person threatened or to any other person; or to cause physical damage to the property of a person other than the actor.

It is a statement 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, but the person making the threat need not intend to actually carry out the threat. A statement made in jest, idle talk, or political argument is not a threat.

CP 12-26.

Jury instruction number 6 is a conglomeration of law regarding threats taken from RCW 9A.04.110(27)(a) and (b), *Virginia v. Black*, 538 U.S. at 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (“‘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”), *Johnston*, 156 Wn.2d at 360-361, 127 P.2d 707, *Kilburn*, 151 Wn.2d at 46, 84 P.3d 1215 (“we expressly [have ruled] that the speaker [making a true threat] need not intend to carry out the threat”), and *Kilburn*, 151 Wn.2d at 43, 84 P.3d 1215 (“A true threat is a serious threat, not one said in jest, idle talk, or political argument.”).

While all statements of law contained in jury instruction 6 are correct, jury instruction 6 fails to instruct the jury that the “reasonable person” who would foresee that the statement would be interpreted as a serious expression of an intention to inflict bodily harm must be the person making the statement. As written, jury instruction six is unclear and does not specify that the jury is to judge the statement from the perspective of a “reasonable person” in the defendant’s place as required by *Kilburn*, 151 Wn.2d at 46, 84 P.3d 1215.

As written, the jury could have read jury instruction 6 to mean that the statement must be judged from the standpoint of a reasonable person who overheard the statement or who was the target of the statement. This “reasonable listener” standard was explicitly rejected in *Johnston*. See *Johnston*, 156 Wn.2d at 360-361, 127 P.2d 707 (A jury instruction informing the jury to interpret the statement from the standpoint of a “reasonable listener-based” standard was not correct since the Washington Supreme Court has adopted the speaker-based standard).

Jury instruction number 6 was therefore an incomplete statement of law in that it did not instruct the jury as to what perspective the reasonable person standard was to be applied.

b. The incomplete statement of law in jury instruction no. 6 relieved the State of its burden of proving all elements of the crime of making a bomb threat.

As discussed above, the State’s burden was to prove that Mr. Caracciolo had made a “true threat.” This means that the State had the burden of proving that a reasonable person in Mr. Caracciolo’s place would foresee that, in context, Mr. Farmer would interpret Mr. Caracciolo’s statement as a serious threat. Jury instruction 6 allowed the jury to find that Mr. Caracciolo’s statement was a true threat if *any* reasonable person would foresee that Mr. Caracciolo’s statement would be interpreted as a serious threat. Jury instruction 6 therefore relieved the

State of its burden of establishing that a reasonable person *in Mr.*

Caracciolo's place would foresee that his statement would be interpreted as a serious threat.

c. Jury instruction no. 6 deprived Mr. Caracciolo of a fair trial.

[A]n erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved the State of its burden to prove each element of the case. To determine whether an erroneous instruction is harmless in a given case, an analysis must be completed as to each defendant and each count charged. From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889 (2002).

If jury instructions may be construed to allow the jury to assume that an essential element need not be proved, the State has been relieved of its burden of proving all elements of the crime beyond a reasonable doubt, and the error affected the defendant's constitutional right to a fair trial.

State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001) ("A defendant cannot be said to have a fair trial if the jury might assume that an essential element need not be proved.")

As discussed above, the jury could read instruction no. 6 in a manner which relieved the State of its burden to prove that a reasonable person in Mr. Caracciolo's position would foresee that his comments

would be interpreted as a serious threat. The jury could read instruction number 6 as allowing Mr. Caracciolo to be found guilty if any reasonable person would foresee that Mr. Caracciolo's statement would be interpreted as a serious threat. Therefore jury instruction number 6 could be construed in a manner which would allow the jury to assume that an essential element of the crime of making a bomb threat, specifically that the threat was a *true* threat, need not be proved. This deprived Mr. Caracciolo of his right to a fair trial.

2. The State presented insufficient evidence to establish that Mr. Caracciolo's statement that he would blowup the QFC was a "true threat."

As stated above, "whether a statement is a true threat or a joke is determined in light of the entire context, and the relevant question is whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke." *Kilburn*, 151 Wn.2d at 46, 84 P.3d 1215.

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. *United States v. Fulmer*, 108 F.3d 1486, 1492 (1st Cir.1997); *Khorrami*, 895 F.2d at 1192; *Melugin v. Hames*, 38 F.3d 1478, 1485 (9th Cir.1994). However, as explained in *Kilburn*, a rule of independent appellate review applies in First Amendment speech cases. An appellate court "must 'make an independent examination of the whole record, ...' so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Kilburn*, 151 Wn.2d at 50, 84 P.3d 1215 (quoting *Bose*, 466

U.S. at 508, 104 S.Ct. 1949) (internal quotation marks omitted). The appellate court is required to independently review only “‘crucial facts’-those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts.” *Kilburn*, 151 Wn.2d at 50-51, 84 P.3d 1215. Thus, whether a statement constitutes a true threat is a matter subject to independent review. The rule of independent appellate review does not extend to factual determinations such as findings on credibility, however. *Id.*; see *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir.2002) (when applying the principle of independent review, the appellate court defers to the trier of fact on matters such as determinations of historical facts and credibility).

Johnston, 156 Wn.2d at 365-366, 127 P.3d 707.

In *Johnston*, Mr. Johnston was seen drinking a personal alcoholic beverage on board a commercial airplane flight. *Johnston*, 156 Wn.2d at 357-358, 127 P.3d 707. A flight attendant warned Mr. Johnston that personal alcoholic beverages were not allowed on the plane and then confiscated the beverages when Mr. Johnston continued to drink them.

Johnston, 156 Wn.2d at 357-358, 127 P.3d 707. Flight attendants advised the pilots of the situation and the pilots notified controllers at Sea-Tac, who in turn notified Port of Seattle police. *Johnston*, 156 Wn.2d at 358, 127 P.3d 707.

When Mr. Johnston exited the airplane, he was met by a Port of Seattle police officer. *Johnston*, 156 Wn.2d at 358, 127 P.3d 707. The officer observed Mr. Johnston’s watery bloodshot eyes and smelled an

obvious odor of intoxicants and concluded that it was obvious Mr. Johnston had been drinking. *Johnston*, 156 Wn.2d at 358, 127 P.3d 707. Mr. Johnston was arrested on unrelated outstanding warrants, and became “visibly upset” about his arrest. *Johnston*, 156 Wn.2d at 358, 127 P.3d 707. While Mr. Johnston was being booked, he said that he would go back to the airport and blow it up. *Johnston*, 156 Wn.2d at 358, 127 P.3d 707. Mr. Johnston stated that “he knew about the airport, and he knew what it would take...all he needed was a Ryder truck and some nitro diesel fuel.” *Johnston*, 156 Wn.2d at 358, 127 P.3d 707. Mr. Johnston was charged with threats to bomb or injure property in violation of RCW 9.61.160.

The Washington Supreme Court ultimately vacated Mr. Johnston’s conviction and remanded for a new trial based on erroneous jury instructions. *Johnston*, 156 Wn.2d at 366, 127 P.3d 707. In the concurrence to the majority opinion, Justices Fairhurst, Johnson, and Sanders concurred that the jury was misinstructed, but wrote that the case should have been dismissed and not remanded. *Johnston*, 156 Wn.2d at 366-367, 127 P.3d 707, *concurring opinion*. The Justices reached this conclusion on grounds that the Supreme Court was authorized to conduct an independent appellate review of the evidence and that their review of the evidence revealed insufficient evidence to establish that Mr. Johnston

had made a true threat. *Johnston*, 156 Wn.2d at 366-367, 127 P.3d 707, *concurring opinion*.

This case is like *Johnston*. The uncontroverted facts introduced in the trial court were that Mr. Caracciolo attempted to buy beer while in a highly intoxicated state. Mr. Farmer refused to sell Mr. Caracciolo beer and Mr. Caracciolo responded by becoming obnoxious and threatening to assault Mr. Farmer. After Mr. Farmer ignored Mr. Caracciolo, Mr. Caracciolo told Mr. Farmer that he was going to blow up the QFC using the propane and fertilizer outside the store.

Like the statements in *Johnston*, given the entire context of Mr. Caracciolo's statement, specifically that Mr. Caracciolo was angry, highly intoxicated, and that Mr. Farmer was ignoring Mr. Caracciolo's threats to "kick his ass," a reasonable person in Mr. Caracciolo's place would not foresee that his threat to blow up the store would be seen as a serious threat by Mr. Farmer.

The statements of an angered and highly intoxicated person, especially threat to perform complicated and extravagant acts such manufacturing a bomb and using it to blow up a building, are not statements of a sort that a reasonable person in the declarant's position would expect to be interpreted as a serious threat. Such statements may not be jokes or political speech, but neither are they statements where the

speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.

As the concurrence in *Johnston* recognized, statements made by angry and highly intoxicated individuals are not statements usually considered to serious expressions, and therefore are not statements which can be considered true threats.

E. CONCLUSION

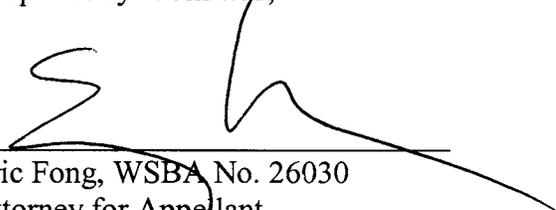
Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), *affirmed* 143 Wn.2d 506, 22 P.3d 791 (2001).

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

This court should vacate Mr. Caracciolo’s conviction and either dismiss the case or remand for a new trial with proper jury instructions.

DATED this 22 day of May, 2008.

Respectfully submitted,



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IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 BRANDON T. CARACCILO,)
)
 Appellant.)

Appeal No. 37117-1-II
Superior Court No. 07-1-01109-7

FILED
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DIVISION II
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STATE OF WASHINGTON
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DECLARATION OF MAILING

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. Brandon T. Caracciolo
c/o P. Tierney
1180 Nebraska Street
Port Orchard, WA 98366

a true copy of the Brief of Appellant.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 16th day of June 2008, at Port Orchard, Washington.

Ann Blankenship
ANN BLANKENSHIP