No. 37615-6-II

FILED
COURT OF APPEALS
DIVISION II

08 DEC 23 AM 10: 09

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

ASTRO MILLER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY and DAVID EDWARDS, JUDGES

BRIEF OF RESPONDENT

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: _____
KATHERINE L. SVOBODA
Deputy Prosecuting Attorney
WSBA #34097

OFFICE ADDRESS:
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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FACTUAL AND PROCEDURAL HISTORY

The State agrees with the history presented in the appellant's brief.

ARGUMENT

The failure to give a "true threat" instruction was harmless error and the verdict of the jury should be affirmed.

The State disagrees with the defendant that proving a "true threat" is an essential element of Threats to Bomb under RCW 9.61.160.[1] Instead, the State contends that the analysis should be the same as in *State v. Tellez.* *Tellez* is a telephone harassment case which held that a "true threat" is not an essential element that must be included in the information or the "to convict" instruction.[2] The court held that "the essential element in the crime of telephone harassment is a threat which must be defined for the jury as a true threat."[3]

In any event, the State concedes that the jury should have been instructed to consider whether or not the threat made by the defendant was a "true threat." However, because this was an instructional error the Court should apply a harmless error analysis to this case.[4] Based upon a review

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[1] Appellant's Brief at 8.
[2] *State v. Tellez,* 141 Wn.App. 479, 170 P.3d 75 (2007).
[3] *Tellez*, 141 Wn.App. at 484.
[4] *See State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002) (A jury instruction that omits or misstates an element of a crime is erroneous but may be harmless if, from the record, it appears beyond a reasonable doubt that the error did not contribute to the verdict.); *State v. Johnston*, 156 Wash.2d 355, 364, 127 P.3d 707 (2006) (noting that instructional error involving the elements of a crime may be harmless error).

of the record the Court should find that there was not a reasonable probability that the lack of a true threat instruction affected the verdict.

"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 take the life of another person.'"[5] But a threat said in jest, idle talk or political argument is not a "true threat."[6] Whether a true threat has been made is determined by applying an objective standard that focuses on the speaker.[7]

Here, viewing the defendant's threats in context, no reasonable juror in the defendant's position could have foreseen that his statements would have been interpreted as a joke, idle talk, or political argument. Rather, a call to 9-1-1 can only be reasonably foreseen to be taken seriously. In fact, the call was taken seriously and resulted in police being dispatched to the scene of the crime. Moreover, the defendant never asserted that his threat was a joke, idle talk or puffery. His best argument was that perhaps he was calling to report a propane smell at the bus mall, yet no testimony supported this argument.[8] If the jury had believed this

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[5]*Tellez* at 482 (internal quotation marks omitted) (quoting *State v. Kilburn*, 151 Wn. 2d 36, 43, 84 P.3d 1215 (2004).
[6]*State v. Johnston*, 156 Wn.2d at 361 (citing *Kilburn*, 151 Wn.2d at 43).
[7]*Kilburn*, 151 Wn.2d at 44.
[8]4/8/08 RP at 57-59.

argument they would have found no threat, true or otherwise and the defendant would have been acquitted.

The facts at bar can be distinguished from *State v. Johnston*, where the court held that the failure to define true threat was not harmless error because there was a genuine dispute about whether the alleged threat was a joke or idle talk.[9] There, an intoxicated airline passenger who was escorted off a flight and arrested told a police officer that he would blow up the airport using a Ryder truck and some nitro diesel fuel.[10] The court accepted the State's concession that the trial court's failure to define "true threat" was not harmless, noting that the evidence was "close" on the issue of whether the statements were a true threat and the jury specifically asked if it could convict on the words alone.[11]

Nor do the facts here compare to those in *State v. Kilburn,* where the court held that the evidence was insufficient for a reasonable person in the defendant's position to foresee that the victim would perceive the statement as a serious threat.[12] There, the defendant was a high school student who smiled as he said he was going to bring a gun to school the next day and shoot everybody, starting with the girl to whom he spoke.[13]

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[9]*Johnston* at 364-65.
[10]*Id.* at 358.
[11]*Id.* at 364.
[12]*Kilburn* at 53.
[13]*Id.* 39, 52.

The girl did not feel scared, knew the boy well, often joked with him and knew of no reason why he might wish to harm her.[14]

In the case at bar, the defendant fails to establish that the failure to give a "true threat" instruction affected the verdict and requires reversal.

CONCLUSION

The error complained of by the defendant in this case is harmless beyond a reasonable doubt and the trial court verdict should be affirmed.

Respectfully Submitted,

By: _____
KATHERINE L. SVOBODA
Deputy Prosecuting Attorney

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[14] *Id* at 52-53.

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STATE OF WASHINGTON, Respondent, v. ASTRO MILLER, Appellant.	No.: 37615-6-II **DECLARATION OF MAILING**

DECLARATION

I, Desire Collins hereby declare as follows:

On the 19 day of December, 2008, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund, 203 4TH Avenue East, Suite 404, Olympia, Washington 98501-1189 Attorneys for Appellant, and to Astro Miller, DOC #747444, Washngton Corrections Center, P. O. Box 900, Shelton, WA 98584 by depositing the same in the United States Mail, postage prepaid.

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 and belief.

DATED this 19 day of December, 2008, at Montesano, Washington.

Desire Collins

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 FAX 249-6064

KLS