

FILED
Court of Appeals
Division II
State of Washington
1/30/2019 12:54 PM

NO. 52521-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

P.H.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY, JUVENILE
DIVISION

The Honorable Marilyn K. Haan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of threatening to bomb or injure property because the state failed to prove appellant made a true threat.

2. Appellant's adjudication of guilt for threatening to bomb or injure property violates the First Amendment because the state failed to prove his statements amounted to a true threat.

Issues Pertaining to Assignments of Error

1. Where the state failed to prove appellant made a true threat, did the state fail to prove all elements of the offense as required under the Due Process Clause?

2. To avoid violating the First Amendment's protection of free speech, statutes proscribing threatening speech must be limited to true threats that would, considering the circumstances, reasonably be foreseen as serious expressions of intent to carry out the threat. At school, 15-year-old appellant was overheard on two occasions telling another student he wanted to "shoot up the school."

On the first occasion (a Friday), appellant made the comment to a friend in gym class – loud enough for anyone in the kickball line to hear – who took it as a joke. The two girls who

overheard the comment likewise were not alarmed. One of the girls testified kids say that all the time as a joke. The other said she was not worried about appellant shooting up the school.

On the second occasion (the following Monday), another student overheard appellant make a similar statement in the hallway between class periods. She did not know to whom the statement was addressed but became scared and contacted authorities.

Where jokes about shooting up the school were commonplace among students, and appellant's statement on Friday about shooting up the school was taken as a joke and laughed at, did the court fail to take all circumstances into account in finding that under the circumstances on Monday (just three days later), a reasonable person would foresee the statement in the busy hallway – loud enough to be overheard – would taken seriously?

B. STATEMENT OF THE CASE

1. Procedural Facts

On March 8, 2018, the Cowlitz county prosecutor charged juvenile appellant P.H. with threatening to bomb or injure property on February 26, 2018.¹ CP 4. According to the state's probable

¹ P.H. was 15 years old at the time of the alleged offense. CP 1.

cause statement, P.H. said something about “shooting up a school” to a fellow student. When interviewed, P.H. said it was a joke and he had no desire to shoot anyone.² CP 1-3.

The state subsequently amended the information to allege the threat occurred between February 14 and February 26, 2018. CP 8-10.

Following an adjudicatory hearing, the court found P.H. guilty and sentenced him to a standard range disposition. CP 11-22. This appeal follows. Id.

2. Trial Testimony

15-year-old P.H. and 14-year-old E.S. were both new to Toutle Lake High School and hung out together at school, particularly in gym. RP 62, 92-93.

On February 23, 2018, P.H. and E.S. were standing in line for kickball and P.H. reportedly said to E.S., “Hey, let’s shoot up the school.” RP 65, 67.

² Deputy Troy Lee interviewed P.H. in the principal’s office on February 27, 2018. RP 4-5. P.H. said he was joking about shooting up the school. RP 7. At the adjudicatory hearing, the state opted not to introduce P.H.’s statement to Lee because Lee failed to advise P.H. of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). RP 32; see e.g. State v. D.R., 84 Wn. App. 832, 930 P.2d 350 (1997) (juvenile was in custody when interviewed by police officer in principal’s office).

According to fellow student B.R. who overheard the statement, P.H. smirked and E.S. chuckled. RP 65, 69.

B.R. was “weirded out” by the statement but not necessarily scared. RP 65, 69-70. She testified “kids usually make that joke all the time and it’s just kind of like, I don’t know, I wasn’t really worried about [P.H.] or how he would act because I don’t think he would actually do anything.” RP 70.

S.J. was standing behind B.R. RP 64, 71. She also overheard P.H. say, “Why don’t we just shoot up the school.” RP 71. S.J. thought “it was a little weird that he would say that,” but “it wasn’t something that [she] actually thought would happen. RP 72, 76.

B.F. is in the same gym class. RP 78. B.F. testified that one day in mid-February 2018 – also while lining up for kickball³ – P.H. “was trying to talk to [her, B.F.] about how he could easily like set up a fire in the bathroom and nobody would know it was him or something.” RP 79-80, 85. B.F. was “really uncomfortable” because she’d “had a house fire” and “it was tragic.” RP 79.

³ There was testimony the youths play kickball every Friday. RP 64.

B.F. testified the fire occurred before P.H. started at Toutle Lake and did not know about it. RP 81-82. In her statement to police, B.F. said she thought P.H. was joking. RP 84. At trial, however, B.F. claimed she was unsure because of the look in his eye. RP 84.

On February 26, 2018, while walking to class, fellow student A.F. overheard P.H. say: "I want to shoot up the school."⁴ RP 57. A.F. didn't know to whom P.H. directed the statement but was scared and called the police. RP 56-57, 59.

That same day, on February 26, P.H. reportedly said to a group of students in gym class, including E.S. and K.D. that "not only mentally unstable people would shoot up a school but people that play video games would, referring to the Florida shooting." RP 60. K.D. did not know P.H. well or whether he would follow through but she took his statement as a serious matter. RP 63.

E.S. testified he heard P.H. "mention shooting up a school" at least two times. RP 93. As E.S. testified: "How I took it was a joke because he didn't really – he didn't really forward it to a certain

⁴ Defense counsel's foundation objections to the alleged statement A.F. reportedly overheard were sustained. RP 52-53. Thereafter, the state elicited that A.F. glanced over upon hearing the statement and believed it was uttered by P.H., whose voice A.F. said she recognized. RP 52-54. Afterward, the parties seemed to proceed as if foundation had been established. See e.g. RP 57.

school, it was just more of a sarcastic joke.” RP 94. E.S. testified P.H. made the statements when the two were having a conversation. RP 94. E.S. testified: “He was joking” and “I just laughed.” RP 94. E.S. had no concern about being in school with P.H. RP 94.

The state relied on the four aforementioned comments equally as evidence of the charge. RP 96-97. Defense counsel argued that P.H.’s statements – while in poor taste – qualified as constitutionally protected speech and did not rise to a level of criminal culpability. RP 106-07.

The court found P.H. guilty. While it did not enter written findings, its oral ruling was as follows:

There are several statements made by the respondent on three different days. The first statement was on February 18, 2018 approximately, and the respondent said he could easily set up a fire in the bathroom and nobody would know it was him.

Another time he said on February 23, 2018 where respondent said something about why don’t we just go shoot up the school.

Another was made on February 26, 2018 regarding respondent going to shoot up the school. An additional statement was made at the school on February 26, 2018 by the respondent saying: Not only mentally-unstable people would shoot up a school but also people who play video games.

The contents of the statements in and of themselves are threatening in nature. The statements were made on school grounds. The statements were

made of shooting up a school which would equate to people and/or property.

So this court believes that the statements were made regarding damaging the school property of Toutle High School.

Statement regarding setting a fire was clearly a statement about causing damage to the high school bathroom. The statements about shooting up a school were made loud enough for several people to hear the statements. The statements about setting fire this court believes was communicated to one individual, Ms. Forbes. Communication of a threat can be direct or indirect.

The question is whether the statements, although the content was threatening, whether they were somehow said in jest or idle talk. In part, the witnesses said when they heard these statements said by the respondent, they thought the respondent was joking but others did not.

This is not a felony harassment charge, so this court is not looking to see how the statements made others feel except maybe to get a better sense of the tone in the statements. Looking at the tone itself, then the court does not find witnesses looked at it as just making a joke but more so of someone that actually was looking to carry out the threat. It was not how he said the statement as much as how his eyes were described when he spoke of setting the fire and the smirk on his face when he spoke of shooting up the school.

The statement that the court finds of greatest concern is that regarding the setting of the fire. Not only did it have damage to the school but one in which there was a plan and statement of how the school would not even know it was the respondent.

This court does not have concern that Ms. Forbes had a personal experience with a fire. The court finds her testimony credible as we were all the witnesses. Her statement about the shooting up of the school, this court may have found the first statement a reasonable person of a high school age

may see it as a statement said in jest. However, to come back three days later and make more threatening statements, the court can only find a reasonable person even of a high school age would perceive that the statements would be interpreted as a serious expression of an intention to inflict damage.

Even [E.S.] after cross-examination related he did not think the statements as funny. The respondent himself said he could understand how the statements could be taken seriously. This court believes these were statements of a true threat.

In looking at the total of the evidence, this court does find that between February 14, 2018 and February 26, 2018, the respondent did threaten to bomb or otherwise injure a public school building and these acts occurred in Cowlitz County, State of Washington. Therefore, this court finds [P.H.] guilty beyond a reasonable doubt of the crime of threats to bomb or injure property as found in RCW 9.61.160.

RP 116-119.

C. ARGUMENT

REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THE STATE FAILED TO PROVE P.H. MADE A "TRUE THREAT."

To satisfy due process under the Fourteenth Amendment, the prosecution bears the burden of proving every element of every crime beyond a reasonable doubt. U.S. Const. amend. XIV; Jackson v. Virginia, 443 U.S. 307, 315-16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).

P.H. was convicted of threatening to bomb or injure property under RCW 9.61.160(1), which makes it unlawful “for any person to threaten to bomb or otherwise injure any public or private school building[.]” Under the statute, it is not a defense that the threatened bombing or injury was a hoax RCW 9.61.160(2).

The statute regulates pure speech and therefore “must nevertheless be ‘interpreted with the commands of the First Amendment clearly in mind.’” State v. Johnston, 156 Wash. 2d 355, 360–62, 127 P.3d 707, 709–11 (2006) (quoting State v. Williams, 144 Wash.2d 197, 207, 26 P.3d 890 (2001) (quoting Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969))).

Despite the substantial protection afforded freedom of speech under the First Amendment, the State may enact laws prohibiting “true threats.” State v. Kilburn, 151 Wn.2d 36, 42-43, 84 P.3d 1215 (2004). 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 individual.” Williams 144 Wn.2d at 207-08 (internal quotes omitted). Statutes proscribing threats must be construed as limited to true

threats in order to avoid invalidation for overbreadth under the First Amendment. State v. Johnston, 156 Wn.2d at 363-64. Whether a true threat has been made is determined under an objective standard that focuses on the speaker, not the listener. Id. at 361.

When the First Amendment true threat analysis is implicated, reviewing courts independently examine the record to ensure that protected speech is not penalized. Kilburn, 151 Wn.2d at 50-52 (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)). While not amounting to full de novo review, the court has a “special responsibility” to independently review the crucial facts relating to whether speech is protected. Id. The true threat analysis includes consideration of the entire context of the statement, including facts ignored by a lower court. Kilburn, 151 Wn.2d at 47, 51.

Even if the plain meaning of the words used may appear to be a threat, the words may not amount to a true threat based on the context. For example, in N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the court held the N.A.A.C.P. chairman’s speeches, although the words purported to threaten violence, were protected speech because no harm actually

resulted and because they were part of the passionate and highly charged political rhetoric of the civil rights movement. Id. at 926-29.

Similarly, in the case that gave rise to the definition of a true threat, Watts v. United States, 394 U.S. 705, 706, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), Watts declared during a group discussion 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." Watts and the others laughed after he made his statement. The U. S. Supreme Court reversed Watts' conviction for threatening the president, concluding that taken in context and considering the reaction of the listeners the statement was not a true threat. Id. at 706-08.

More recently, in Kilburn, the Washington Supreme Court reversed a conviction for harassment based on a threat made to a school classmate. 151 Wn.2d at 38-39. In that case, K.J. came to school and told a friend, "I'm going to bring a gun to school tomorrow and shoot everyone and start with you . . . maybe not you first." Id. at 39. The friend thought he might be joking but was not sure. Id. As she thought about it more, she began to fear he was serious and told her parents, who called 911. Id. Despite the inherently alarming nature of K.J.'s statements, the court found insufficient evidence of a true threat. Id. at 54.

First, the court noted that K.J. had stated he was only joking and the trial court found him credible. Id. at 52. He testified that when he made the statement, he was with a group of students standing around chatting and giggling about a book involving guns and the military. Id. at 52. The friend confirmed that after he made the statement, K.J. began giggling as if he were not serious. Id. at 52. The friend testified that, at the time, she was not scared, but only surprised because, in the two years she had known him, K.J. had always treated her nicely. Id. at 52. Based on these facts, the court concluded that a reasonable person in K.J.'s position would not reasonably foresee that the threat would be taken seriously. Id. at 53.

“Innocent blather and jokes about harming people are protected by the First Amendment.” State v. King, 135 Wn. App. 662, 669, 145 P.3d 1224 (2006). This case also involves circumstances under which a reasonable person would not foresee his statement or alleged threat would be taken seriously.

First, the statement the court found most alarming was P.H.'s statement to B.F. that he could easily set a fire in the bathroom and nobody would know it was him. R.P. 79-80. But this statement does

not even qualify as a “threat.” The criminal code defines threat (in relevant part) as:

- (28) “Threat” means to communicate, directly or indirectly the intent:
 - (a) To cause bodily injury in the future to the person threatened or to any other person; or
 - (b) To cause physical damage to the property of a person other than the actor[.]

RCW 9A.04.110. Here, P.H. merely observed that he could probably start a fire in the bathroom without anyone knowing it was him. He never stated he intended to start a fire. In other words, he did not threaten B.F. with starting a fire. The statement is of the same ilk as President Trump’s statement during the election that he could shoot someone on Fifth Avenue and not lose voters. See <https://www.cnn.com/2016/01/23/politics/donald-trump-shoot-somebody-support/index.html> (last accessed 1/28/19).

But even assuming P.H.’s statement qualifies in the general sense as a threat, it does not qualify as a “true threat.” Importantly, it concerns harm to the school bathroom only, not bodily harm or death of another person. Because it concerns property damage only, it is not a true threat as defined under Williams, supra.

Second, P.H.’s observation that it’s not only mentally unstable people who shoot up schools but also people who play

video games is not a “threat.” It’s P.H.’s personal observation or belief. It’s unclear how this statement could be construed as a threat of any kind.

Third, the court correctly refused to find that P.H.’s statement to E.S. in gym class (overheard by B.R. and S.J.) to the effect of, “let’s shoot up the school,” qualified as a true threat. P.H. smirked when he made the statement and E.S. chuckled. P.H. made the statement loud enough for other students to hear. B.R. testified other kids make that joke all the time. S.J. said it wasn’t something she thought would actually happen. E.S. testified he took it as a joke. The court correctly found that under the circumstances a youth in P.H.’s position would not reasonably foresee that his alleged “threat” would be taken seriously.

Nonetheless, the court found that because that statement was made on Friday and P.H. came back and made the same statement on Monday in a crowded hallway loud enough for A.F. to hear that on this occasion somehow, a reasonable person now would foresee that the statement would be taken seriously. But the only circumstance that had changed was the person who overheard the statement – A.F. Yet, the test for what constitutes a “true threat” focuses on the speaker, not the listener. And for P.H.,

nothing had changed. He made the same statement to E.S. only a few days earlier and E.S. chuckled and took it as a joke. Moreover, as B.R. noted, students say this kind of thing all the time as a joke. Presumably, P.H. was speaking to another student, quite possibly E.S. since E.S. said he heard P.H. make the statement on two occasions. No one took P.H. seriously before, a reasonable person under the circumstances would not suddenly think the statement would be perceived otherwise. The court failed to take all the facts and circumstances into account when determining this latter comment qualified as a “true threat.”

In sum, an independent review of the facts leads to the conclusion that P.H.’s statements do not qualify as a true threat. “It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court’s findings. The First Amendment demands more.” Kilburn, 151 Wn.2d at 49. Reversal is required because the state failed to prove beyond a reasonable doubt that P.H. made a true threat that was unprotected speech.

D. CONCLUSION

Because the state failed to prove its case, P.H.'s conviction must be reversed and dismissed. State v. Smith, 155 Wash. 2d 496, 505, 120 P.3d 559, 563 (2005)

Dated this 30th day of January, 2019

Respectfully submitted

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A handwritten signature in black ink, appearing to read "Dana M. Nelson", written over a horizontal line.

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January 30, 2019 - 12:54 PM

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