FILED
OCTOBER 26, 2012
Court of Appeals
Division III
State of Washington

No. 29268-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DUNCAN J. MCNEIL III,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno

AMENDED REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The trial court's failure to instruct the jury that the term "threat" must be limited to a "true threat" requires reversal.

The harassment statute criminalizes "threats," which are pure speech. RCW 9A.46.020(1)(A); State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001). Accordingly, the jury must be specifically instructed that only "true threats" may be proscribed, to comport with the constitutional protection of freedom of expression. U.S. Const. amend. I; Wash. Const. art. I, sec. 5; Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969); State v. Schaler, 169 Wn.2d 274, 285-87, 236 P.3d 858 (2010); State v. Atkins, 156 Wn. App. 799, 805, 236 P.3d 897 (2010). 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 person. A true threat is a serious one, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

State v. Kilburn, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004) (internal citations and punctuation omitted).

The trial court's failure to instruct the jury on "true threats" requires reversal. Instructional error is of constitutional magnitude and presumed prejudicial unless the reviewing court is convinced beyond a

reasonable doubt that any reasonable juror would have reached the same verdict in the absence of the error. Chapman v. California, 386 U.S. 18, 21, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). Here, the State presented evidence that Mr. McNeil repeatedly stated he was going to kill Mr. Sullivan, Mr. Ashby, and Mr. Hall, but, by special verdict, the jury specifically found Mr. McNeil did not make threats to kill. RP 121, 125, 215-16, 219, 220-21, 237, 239; CP 195 (Special Verdict Ct. I), 199 (Special Verdict Ct. III), 201 (Special Verdict Ct. IV), 203 (Special Verdict Ct. V). The special verdicts indicate that the jury was not persuaded beyond a reasonable doubt that Mr. McNeil's statements were serious threats, unprotected by the constitution, rather than mere rhetoric, idle talk, or hyperbole. Under these circumstances, the instructional error was not harmless.

The prosecutor's repeated references to RCW 9.94A.345 are inapt. See Br. of Resp. at 3-4. RCW 9.94A.345 is found within the Sentencing Reform Act, which governs felony sentences, and provides, "A sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." First, insofar as Mr. McNeil was not convicted of a felony and does not challenge his sentence, this provision of the Sentencing Reform Act simply does not apply.

Second, rather than address the substance of Mr. McNeil's argument, the prosecutor states that the 2002 version of the harassment statute does not use the term "true threat." Br. of Resp. at 4-6. The prosecutor misapprehends the difference between proving the statutory elements of an offense and proving the speech was unprotected by the federal and state constitution. See e.g., City of Bellevue v. Lorang, 140 Wn.2d 19, 23-24, 992 P.2d 496 (2000). Where, as here, a criminal statute penalizes speech, the State bears the burden of proving beyond a reasonable doubt both the statutory elements of the offense and that the speech was unprotected by the First Amendment. Kilburn, 151 Wn.2d at 54. The absence of the term "true threat" in the statute does not relieve the State of its burden of proof that the speech was unprotected by the First Amendment to the United States Constitution, ratified in 1791, and by Article 1, section 5 of the Washington Constitution, ratified in 1889. It may be noted, the term "true threat" is similarly not present in the current harassment statute, but has been implied by the Washington Supreme Court to avoid violating the constitution.[1] See e.g., Williams, 144 Wn.2d at 207-08.

[1]RCW 9A.46.020 was amended in 2003 to clarify and simplify the identification and referencing to crimes without changing substantive provisions. RCW 9A.46.020 was again amended in 2011 to specifically criminalize harassment of a criminal justice participant. Neither amendment is germane to the instant charges.

The prosecutor complains that Mr. McNeil cites to case law decided after this offense. Br. of Resp. at 4-5. Without actually using the term "retroactive," the prosecutor seems to argue that cases interpreting "true threat" decided after this incident created new law that does not apply retroactively. This is incorrect. When a court interprets a statute, it is considered to have had that meaning from inception. In re Detention of Halgren, 156 Wn.2d 795, 815, 132 P.3d 714 (2006), citing Johnson v. Morris, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976).

Even assuming the subsequent cases created new law, the cases apply retroactively to any case pending appeal. "A 'new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.'" In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992), quoting Griffith v. Kentucky , 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). In addition:

> principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

State v. Robinson, 171 Wn.2d 292, 305, 253 P.3d 84 (2011). Therefore, even if the subsequent cases truly created a new interpretation, the decisions apply retroactively to the present case.

Moreover, federal and state cases decided before 2002 consistently limit statutes that criminalize speech to unprotected speech, such as "true threats," to comport with the constitutional right to freedom of expression. See, e.g., Watts, 394 U.S. at 707; Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002); Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 536, 936 P.2d 1123 (1997); Williams, 144 Wn.2d at 207-08; State v. J.M., 101 Wn. App. 716, 723-24, 6 P.3d 607 (2000), State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998).

The State attempts to isolate J.M. to felony harassment only. Br. of Resp. at 5. In J.M., the juvenile defendant was adjudicated guilty of felony harassment, based on statements he made to two classmates that he planned to kill the school principal, the school administrator, and a school security guard. 101 Wn. App. at 719-20. The principal learned of the threats the following day and was concerned for his safety due the defendant's disciplinary history and because the threats were made shortly after a highly publicized school shooting. Id. at 721. On appeal, the defendant "did not deny he knowingly communicated a 'true threat.'" Id.

at 724. Rather, he unsuccessfully argued that the felony harassment statute required the State to prove he knew or should have known that his threats would be relayed to the principal. Id. at 721. The court's reasoning does not distinguish between gross misdemeanor harassment and felony harassment and, because the matter was tried in juvenile court, jury instructions were not an issue. The State's argument that J.M. applies the term "true threats" to felonies only should be disregarded.

The prosecutor argues the special verdicts indicate the jury was not convinced the defendant intended to kill the State witnesses. Br. of Resp. at 6. This argument misstates the question posed by the special verdict. The special verdict form asked the jury to determine "Did the defendant's threats to cause bodily harm consist of a threat to kill the person threatened or another person?" CP 195, 197, 199, 201, 201. Intent to kill is not an element of the offense of harassment. See RCW 9A.46.020. Both the constitutional prohibition against "true threats" and the harassment statute restrict speech only, not homicidal intent. The prosecutor's argument should be rejected.

2. The State failed to establish Mr. Sullivan was placed in reasonable fear on May 16, 2003, as alleged in Count I.

The State bears the burden of proving beyond a reasonable doubt every essential element of the offense charged. U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1968, 25 L.Ed.2d 368 (1970); City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). The second element of the "to convict" instruction for Count I required the State to prove "That the words or conduct of the defendant placed Michael Sullivan in reasonable fear that the threat would be carried out." CP 182 (Instruction No. 7).

Evidence was introduced that Mr. McNeil made alleged threatening statements both inside and outside the office building. RP 123-25. In closing argument, the State specifically elected to rely on the evidence pertaining to statements made inside the building only.

> We basically have two incidents here. The first is May 16th. These are Counts I, II and III.
>
> Again, this is in Mike Sullivan's office with Stan Ashby and Ken Hall, and defendant banging on the door, yelling, spitting, trying to get in and threatening to kill each of the victims.

RP 668-69. Yet, Mr. Sullivan testified he was not threatened inside his office on May 16, 2002. RP 122, 125. Therefore, the State failed to establish the essential element that "the person by words or conduct places

the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1)(b); CP 181-86 (Instruction Nos. 6-11).

The prosecutor fails to recognize that Mr. Sullivan was the alleged "person threatened" in Count I, as charged. Neither Mr. Sullivan, Mr. Hall, nor Mr. Ashby testified that Mr. McNeil threatened Mr. Sullivan inside the office building, and Mr. Sullivan clearly acknowledged that he did not feel threatened at that time. RP 119-20, 121-22, 123-25, 212-13, 215-16, 237, 239, 245. In the absence of evidence that Mr. Sullivan was "the person threatened" or that he was placed "in reasonable fear that the threat will be carried out" inside the office, the conviction for Count I cannot stand.

When a conviction is reversed for insufficient evidence, the constitutional protection against double jeopardy prohibits retrial for the same offense. "[T]he Double Jeopardy Clause precludes as second trial once the reviewing court has found the evidence legally insufficient." Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); accord State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The prosecutor's characterization of this legal principle as "utterly without merit" should be ignored. Br. of Resp. at 7.

3. The State presented evidence of multiple acts but the court did not instruct the jury it must be unanimous as to which act was proven beyond a reasonable doubt, in violation of Mr. McNeil's right to a unanimous verdict.

When the evidence indicates several distinct acts, any one of which could form the basis for a conviction, the constitutional right to conviction only upon a unanimous jury verdict requires either that the State elect which act it is relying on as the basis for the charge, or the court instruct the jury it must unanimously agree that the same act has been proven beyond a reasonable doubt. U.S. Const. amend. VI; Wash. Const. art. I, sec. 21; State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In a multiple acts case, the failure to give a unanimity instruction is presumed to be prejudicial error. State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993).

Assuming, arguendo, the State did not elect to rely only on statements made inside the building, Mr. McNeil's convictions on Counts I and III must be reversed. Given the two separate incidents of alleged threats on May 16, 2002, the testimony of Mr. Sullivan and Mr. Ashby that they were threatened outside the building only, Mr. Hall's testimony that he was threatened inside the office only, and the jury verdict of "guilty" as to Mr. Sullivan and Mr. Ashby but "not guilty" as to Mr. Hall,

the jury could not have not been unanimous as to which incident it was relying for the convictions for harassment on May 16, 2002.

The prosecutor argues that the State was required to prove only that the acts occurred in the State of Washington. Br. of Resp. at 8. This argument conflates the statutory jurisdictional requirement with the constitutional right to unanimity, and disregards over 100 years of jurisprudence requiring jury unanimity in a multiple acts case. See, e.g., State v. Workman, 66 Wash. 292, 294-95, 119 Pac. 751 (1911).

The prosecutor contends "there are multiple counts but not multiple acts." Br. of Resp. at 8. This contention is contrary to the evidence introduced at trial regarding one incident inside the office and a separate incident outside the building, both occurring on the same date.

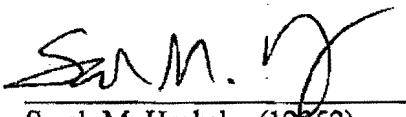
B. CONCLUSION

The prosecutor misapprehends its burden of proving both the statutory elements of harassment and that the speech was unprotected by the First Amendment. The prosecutor further misapprehends its burden of proving the statutory jurisdictional requirements and of requiring unanimity as to a single act, where, as here, the evidence indicates multiple acts at multiple locations. The prosecutor incorrectly dismisses cases decided after the trial in this matter, even though either the cases did not create a new law or the "new law" applies retroactively. For the

foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. McNeil respectfully requests this Court reverse his convictions for gross misdemeanor harassment.

DATED this 26th day of October 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 29268-1-III
	)	
DUNCAN MCNEIL III,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY ANDREW METTS III SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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