

32126-6-III
COURT OF APPEALS
DIVISION III

FILED
Aug 04, 2014
Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL C. LEMMONS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENTS OF ERROR1

B. ISSUES1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT4

 1. THE CONVICTION VIOLATES MR.
 LEMMONS’S RIGHTS UNDER THE FIRST
 AMENDMENT.....4

E. CONCLUSION.....7

TABLE OF AUTHORITIES

WASHINGTON CASES

CITY OF SEATTLE V. ABERCROMBIE, 85 Wn. App. 393,
945 P.2d 1132 (1997)..... 4

STATE V. J.M., 144 Wn.2d 472,
28 P.3d 720 (2001)..... 5

STATE V. KILBURN, 151 Wn.2d 36,
84 P.3d 1215 (2004)..... 4, 5, 6

STATE V. KING, 135 Wn. App. 662,
145 P.3d 1224 (2006)..... 5

STATE V. TALLEZ, 141 Wn. App. 479,
170 P.3d 75 (2007)..... 5

SUPREME COURT CASES

THORNHILL V. ALABAMA, 310 U.S. 88,
60 S.Ct. 736, 84 L.Ed. 1093 (1940)..... 4

CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT..... 1, 4, 5, 7

A. ASSIGNMENTS OF ERROR

1. The conviction violates the defendant's First Amendment right to free speech.

B. ISSUES

1. When the accused has a history of making empty threats and on a particular occasion makes insulting remarks and loud threats to "kill everyone," to which his listeners respond by confronting and accosting him, does the evidence show that the apparent threats are unprotected speech, which the defendant should foresee would be taken seriously, and thus are sufficient to permit conviction for felony harassment?

C. STATEMENT OF THE CASE

Daniel Lemmons was convicted of one count of felony harassment of Marc Hathaway. (CP 65)

According to Christopher Kowzan, Mr. Lemmons drove into the parking lot next to the bar and grill and, after making rude and insulting remarks to Mr. Hathaway, yelled "I am going to kill you all" or "I will kill you all." (RP 20, 22, 24, 56, 61-62) Mr. Kowzan understood this threat to

be directed at all the patrons of the bar who were standing outside. (RP 24)

According to Jennifer Hathaway, Mr. Lemmons said something along the lines of “he’d have to shoot everybody.” (RP 98) She understood the statement to mean Mr. Lemmons would shoot her husband Marc and everybody else. (RP 108-09) Ms. Hathaway was not outside when she heard this. (RP 111) Ms. Hathaway recalled that Mr. Lemmons was calling her filthy names. (RP 96)

Jennifer’s mother, Shelley Persons, heard Mr. Lemmons say he was going to kill Marc and his whole family. (RP 125) While Mr. Lemmons was screaming that he was going to kill everybody, Ms. Persons went over to tell him to leave and slapped him. (RP 127) Mr. Lemmons continued to yell that “he was going to kill everybody.” (RP 128)

According to Mr. Hathaway, Mr. Lemmons “said he was going to kill us all.” (RP 149) He explained that about four years earlier he and Mr. Lemmons were growing medical marijuana, and as a result of a misunderstanding Mr. Lemmons believed Mr. Hathaway owed him money. (RP 141) Since then, every time Mr. Hathaway saw Mr. Lemmons, Mr. Lemmons would threaten him, and as a result Mr. Hathaway had come to fear Mr. Lemmons. (RP 143, 147)

Mr. Hathaway recalled that, on the evening in question, Mr. Lemmons drove into the parking lot and began cursing and slandering Ms. Hathaway. (RP 149) When Mr. Hathaway told Mr. Lemmons he didn't appreciate it, the cursing escalated. (RP 149) In response, Mr. Hathaway jumped over the fence, tore off his shirt, and began to approach Mr. Lemmons until he saw what he thought was a gun. (RP 150)

Mr. Lemmons drove away when Mr. Kowzan said he was going to call the cops. (RP 152)

The court instructed the jury:

To convict the defendant of the crime of felony harassment, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 2, 2013 the defendant knowingly threatened to kill Marc D. Hathaway immediately or in the future;
- (2) That the words or conduct of the defendant placed Marc D. Hathaway in reasonable fear that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority; and;
- (4) That the threat was made or received in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

(CP 49)

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.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

(CP 53)

D. ARGUMENT

1. THE CONVICTION VIOLATES MR. LEMMONS'S RIGHTS UNDER THE FIRST AMENDMENT.

A criminal statute that prohibits a substantial amount of constitutionally protected free speech violates the First Amendment and is facially overbroad. *City of Seattle v. Abercrombie*, 85 Wn. App. 393, 397, 945 P.2d 1132 (1997); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

In *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004), the Washington State Supreme Court held that because the harassment statute, RCW 9A.46.020, criminalizes “pure speech,” it must comply with the requirements of the First Amendment. *State v. Kilburn*, 151 Wn.2d at 41, 84 P.3d 1215. Innocent threats are protected speech but “true threats are not.” Because the harassment statute criminalizes speech, the State must prove the threat was a pure threat and not a threat made “in jest, idle talk, or political argument.” *State v. Kilburn*, 151 Wn.2d at 43, 84 P.3d 1215.

Whether a statement is a true threat is determined by applying an objective standard that focuses on the speaker. *Kilburn*, 151 Wn.2d at 44, 84 P.3d 1215. “A true threat is a statement made in a context or under circumstances where a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intent to inflict bodily harm” *State v. Tallez*, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (internal quotation marks omitted). Innocent blather and puffery are protected speech. *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720 (2001); *State v. King*, 135 Wn. App. 662, 669, 145 P.3d 1224 (2006).

Kilburn involved a high school student who told another student that he was going to bring a gun to school the next day and shoot everyone, starting with the student to whom the threat was made. In considering whether the evidence was sufficient to show Kilburn’s statements were not protected under the First Amendment, the Court independently reviewed the factual context in which they were made. 151 Wn.2d at 52.

The Court noted that the student to whom the statements were made initially thought Kilburn was joking and that he had regularly joked with her and the other students. *Id.* at 53. In concluding that a reasonable person in Kilburn’s place would not foresee that his statements would be taken seriously, the court cited the similarity between this and earlier

occasions in which Kilburn's remarks were not taken seriously. The Court held the State had failed to show a true threat, even though the student to whom the remarks were made testified they freaked her out and, because talking about guns was against school rules, she thought he must have been serious. *Id.* at 53-54.

Here, the entire context shows that Mr. Lemmons's alleged threats were not a joking matter but rather a matter of puffery or blather. The statements were apparently addressed to a group of a dozen or more patrons and employees of the bar, and there is no evidence anyone other than Mr. Hathaway and his family appeared to be frightened by the statements. While Mr. Hathaway and his wife and mother-in-law all claimed they believed the threats were specifically directed at them, their behavior belies any suggestion that they considered Mr. Lemmons's remarks a serious threat to kill, since none of them retreated and indeed they all approached Mr. Lemmons to engage in further disputation. This conduct is consistent with evidence that Mr. Lemmons had made threatening remarks to Mr. Hathaway over a four-year period without inflicting any physical harm.

E. CONCLUSION

The record demonstrates that Mr. Lemmons is all sound and fury and has never been given any reason to believe anyone would take his exaggerated threats seriously. Under the objective standard enunciated in Kilburn, the state has failed to show that a true threat was made. The conviction violates Mr. Lemmons's rights under the First Amendment and should be reversed.

Dated this 1st day of August, 2014.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

| | | |
|----------------------|---|-----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | No. 32126-6-III |
| |) | |
| vs. |) | CERTIFICATE |
| |) | OF MAILING |
| DANIEL C. LEMMONS, |) | |
| |) | |
| Appellant. |) | |

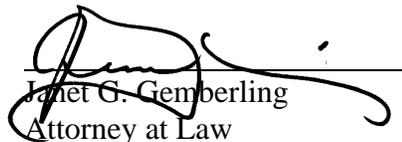
I certify under penalty of perjury under the laws of the State of Washington that on August 2, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark Lindsey
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I certify under penalty of perjury under the laws of the State of Washington that on August 2, 2014, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on August 2, 2014.


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