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Court of Appeals  
Division III  
State of Washington

32126-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

DANIEL CORRIE LEMONS JR., APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## INDEX

I. ASSIGNMENTS OF ERROR.....	1
II. ISSUE PRESENTED .....	1
III. STATEMENT OF THE CASE .....	1
IV. ARGUMENT.....	1
V. CONCLUSION .....	6

## TABLE OF AUTHORITIES

### CASES

<i>State v. Hansen</i> , 122 Wn.2d 712, 862 P.2d 117 (1993).....	2
<i>State v. Kilburn</i> , 151 Wn.2d 36, 84 P.3d 1215 (2004).....	2, 4, 5
<i>State v. Stephenson</i> , 89 Wn.App. 794, 950 P.2d 38 (1998).....	1
<i>United States v. Fulmer</i> , 108 F.3d 1486 (1 <sup>st</sup> Cir.1997).....	2
<i>United States v. Howell</i> , 719 F.2d 1258 (5 <sup>th</sup> Cir.1983).....	2
<i>United States v. Khorrami</i> , 895 F.2d 1186 (7 <sup>th</sup> Cir.1990).....	2
<i>United States v. Orozco–Santillan</i> , 903 F.2d 1262 (9 <sup>th</sup> Cir.1990).....	2

## **I. ASSIGNMENTS OF ERROR**

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

## **II. ISSUE PRESENTED**

Were the defendant's statements that he would "kill them all" true threats?

## **III. STATEMENT OF THE CASE**

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case

## **IV. ARGUMENT**

The defendant's threats were not protected under the First Amendment right to free speech. The defendant admits that his statements were "not a joking matter." App. Br., 6. The defendant did not testify, so the evidence before the jury consisted of their decisions on whether or not the defendant's threats were "puffery or blather."

A "true threat" is a statement made in a context in which a reasonable person would foresee that the statement would be interpreted by a person to whom it is directed as a serious expression of an intent to inflict bodily harm or death. *State v. Stephenson*, 89 Wn.App. 794, 801, 950 P.2d 38 (1998) [quoting, *United States v. Khorrami*, 895 F.2d 1186, 1192 (7<sup>th</sup> Cir.1990) (quoting, *United States v. Hoffman*, 806 F.2d 703, 707

(7<sup>th</sup> Cir.1986)]. This Court has “adopted an objective test of what constitutes a ‘true threat.’” *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). A “true” threat exists if the speaker would reasonably foresee under the circumstances that the listener would believe he or she will be subject to physical violence. *Id.*; *United States v. Orozco–Santillan*, 903 F.2d 1262, 1265–66 (9<sup>th</sup> Cir.1990), overruled in part on other grounds by *United States v. Hanna*, 293 F.3d 1080 (9<sup>th</sup> Cir.2002).

“A true threat ‘is a serious one, not uttered in jest, idle talk, or political argument.’” *State v. Hansen*, 122 Wn.2d 712, 718 n. 2, 862 P.2d 117 (1993) (quoting *United States v. Howell*, 719 F.2d 1258, 1260 (5<sup>th</sup> Cir.1983)). True threats are not protected speech under the First Amendment. *See, e.g., United States v. Fulmer*, 108 F.3d 1486 (1<sup>st</sup> Cir.1997); *United States v. Howell, supra*; *United States v. Khorrami, supra*.

As noted, the test for a “true” threat is an objective one. The defendant did not testify and his only witness did not address the defendant’s intent when he made his threats from his vehicle. Lacking any evidence of what was going on in the defendant’s mind, the defense on appeal changes the focus of the inquiry away from the defendant and puts the focus on the persons who were threatened. The defendant points to various actions of the persons being threatened and claims that the threat

had to be “innocent blather or puffery” based on the way the victims behaved. Aside from removing the focus from the defendant, this line of thought puts the onus on the victims. While the defendant’s argument has a surface appeal, the inconsistency it creates is obvious. Would a battle-hardened marine be intimidated by the defendant? Probably not. On the other hand, an individual raised in a protected environment might be extremely afraid.

When the focus of the inquiry is placed on the defendant where it belongs, it is seen that the victims and their interpretation of the threats is not what is anticipated by the law. There is an objective standard in this case: Could the *speaker* reasonably foresee that, under the circumstances, that the listener would believe that he or she will be subject to physical violence. Thus, the defendant’s arguments regarding the actions the victims took are irrelevant. What the jury needed to decide is whether the defendant should have known, as a reasonable person, how his statements would be perceived by the victims.

The jury had the testimony from which they could sift through the bits of proof that tended to show that the defendant was serious. The defendant and Mr. Hathaway had known each other for a number of years. There was an ongoing “feud” between the defendant and Mr. Hathaway over money supposedly fronted by the defendant (apparently for a

marijuana growing operation) and not returned by Mr. Hathaway. The defendant struck Mr. Hathaway in the face at one point in the past. RP 143. On the night in question the defendant's vehicle was described as "racing" and spinning around. RP 19. The defendant yelled for Mr. Hathaway. The nature of the threats to Mr. Hathaway was not made in jest and certainly not idle talk. The statements were certainly not of a political nature. The vile invective being directed to Mr. Hathaway's wife by the defendant showed that the defendant was not just joking around. RP 96. Mr. Kowzan testified that the defendant held up a gun and stated, "I am going to kill you all." RP 22.

Mr. Hathaway was asked: "You weren't afraid of getting shot by Mr. Lemmons on this occasion, were you? Mr. Hathaway replied: "Yes, I was." RP 159.

The defendant's only witness, Sheila Lemmons, the defendant's mother, did not become aware of the encounter until August 6, four days after the crime, but still attempted to create an alibi defense for the defendant. RP 176. This attempt was rejected by the jury.

The defendant argues that the holding in *State v. Kilburn, supra*, is controlling in this case. While decided using the tools previously used by the Washington State Supreme Court to decide "true threat," the *Kilburn* case is factually very different from this case. The defendant in *Kilburn*

was a young person who had previously made numerous jokes. The person to whom he uttered the alleged threat interpreted his statements as just another joke. The witness did not believe that Kilburn was really going to come to the school and kill everyone.

However, in this case, the victim of Count I, Mr. Hathaway, had plenty of reasons to believe the defendant intended to do exactly what he yelled.

The State did not need to show that the defendant actually intended to carry out his threat(s). *Kilburn, supra*. “We hold that proof that the speaker intended to carry out his or her threat is not required by either the First Amendment or the harassment statute.” *Kilburn, supra* at 38.

We hold that the First Amendment does not require that the speaker actually intend to carry out the threat in order for a communication to constitute a true threat, and that the State need not prove such intent.

... Instead, the relevant constitutional question under the circumstances here is whether there is sufficient evidence that a reasonable person in Kilburn’s position would foresee that his comments would be interpreted as a serious statement of intent to inflict serious bodily injury or death.

*Kilburn, supra* at 48.

**V. CONCLUSION**

For the reasons stated above, the State respectfully requests that the conviction be affirmed.

Dated this 25 day of September, 2014.

STEVEN J. TUCKER  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578  
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL CORRIE LEMONS, JR,

Appellant,

NO. 32126-6-III

CERTIFICATE OF MAILING

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I certify under penalty of perjury under the laws of the State of Washington, that on September 25, 2014, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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9/25/2014

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(Place)

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(Signature)