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Court of Appeals
Division III
State of Washington
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No. 35988-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

PETER J. ARENDAS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Mr. Arendas’s custodial statements were constitutionally protected idle talk, and not true threats.

1. The State cites the incorrect standard of review.

Mr. Arendas challenges the sufficiency of evidence to establish beyond a reasonable doubt that his statements were true threats unprotected by the First Amendment and Article I, section 5. A sufficiency challenge that implicates core First Amendment rights requires the appellate court to conduct an independent review of the record to determine whether the speech in question was unprotected. *State v. Johnston*, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006). “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.” *State v. Kilburn*, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). The “rule of independent review” requires an appellate court to “freshly examine” crucial facts that are intricately intermingled with the legal question.” *Id.* at 50-51. Thus, the State’s argument that this Court’s review is limited to whether substantial evidence supported its case is contrary to First Amendment jurisprudence in this state. *See Br. of Resp.* at 5.

2. The State incorrectly focuses on the listeners and not on the speaker.

Washington courts have adopted an objective speaker standard for analyzing whether a statement is protected or unprotected speech. “A true threat is a serious one, not one said in ... idle talk.... Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.” *Kilburn*, 151 Wn.2d at 43-44 (internal citations and quotations omitted). Statements that “bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole” are not true threats. *State v. Kohonen*, 192 Wn. App. 567, 576, 370 P.3d 16 (2016) (quoting *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010)).

Contrary to the objective speaker standard, the State focuses entirely on the reaction of the people who either heard or were notified of Mr. Arendas’s invective. However, evidence of the reasonable fear of listeners or third-parties is relevant only to establish a statutory element of the crime of harassment.¹ Washington courts have

¹ RCW 9A.42.020 provides in relevant part:

- 1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
... and

specifically rejected the listener-based test when considering whether a statement is protected or unprotected speech for purposes of the First Amendment. *Johnston*, 156 Wn.2d at 364 (trial court erred by giving an instruction that defined “true threat” in terms of the reasonable listener-based standard, rather than the reasonable speaker-based standard), *cited with approval in State v. Allen*, 176 Wn.2d 611, 628, 294 P.3d 679 (2013). Therefore, the reaction of the people who either heard or were notified of the statements does not inform the First Amendment analysis.

3. The State improperly relies on alleged behavior subsequent to the charging period.

Count I, naming Tammy Anderson as the person threatened, was alleged to have occurred “on or about October 20, 2017 through October 23, 2017.” CP 19. Count III, naming Tim Curran as the person threatened, was alleged to have occurred “on or about November 4, 2017.” CP 20. The trial was held on March 21-22, 2018.

The State improperly relies on evidence of subsequent alleged acts to argue Mr. Arendas’s subsequent behavior was in conformity

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

with the harassment allegation. The State alleges, “During the trial the defendant’s behavior was consistent with his combative demeanor observed by jail staff.” Br. of Resp. at 4. The State further alleges, “[T]he testimony, and behavior of the defendant at trial showed that the threats were not a joke or made in jest, especially given the fact that the defendant was upset and angry for having been convicted of assaulting a law enforcement officer.” Br. of Resp. at 6.

Reliance on evidence of other acts to prove a person’s propensity is expressly prohibited by ER 404(b), which provides:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

For example, in *State v. Wade*, the juvenile defendant was charged with unlawful possession of cocaine with intent to deliver. 98 Wn. App. 328, 332, 989 P.2d 576 (1999). At trial, the State admitted evidence of two prior acts of drug dealing, and the defendant was found guilty. *Id.* The appellate court reversed on the grounds that the evidence of prior acts was inadmissible to establish the defendant’s propensity to commit the crime charged. The Court wrote:

Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith. ... When the State offers evidence of prior acts to demonstrate intent, there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act goes to intent is not a magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].

Id. at 334-35 (internal citations and quotations omitted).

It may be noted, the author of the Brief of Respondent, Mr. Quesnel, was also the trial prosecutor. At trial, Mr. Quesnel similarly attempted to invoke allegedly threatening behavior subsequent to the charging periods, but he was unsuccessful.

MR. QUESNEL: And have you had any further experience with Mr. Arendas related to threatening behavior toward you?

OFC. CURRAN: Yes.

...

MR. QUESNEL: Do [sic] you were describing other threatening ---

OFC. CURRAN: Sure, in a passed down [sic], just two days ago. I mean the threats have been ongoing and uh in a pass down [sic] two days ago uh ---

RP 622-24. Mr. Arendas objected and the court admonished the prosecutor to confine his questions to the relevant period of time.

THE COURT: I believe that you need to restrict your questioning ---

MR. ARENDAS: Thank you.

THE COURT: To the events up to the point of the charges.

RP 624.

The State's references to allegations subsequent to the charging period as evidence of Mr. Arendas's propensity is prohibited by ER 404(b) and should be disregarded.

B. CONCLUSION

An independent review of the evidence confirms Mr. Arendas's custodial statements were mere idle talk, and not true threats. He was in custody pending sentencing on two recent convictions that did not involve the alleged targets in the instant case, and he did not make the statements directly to the correctional officers. In fact, the statements Mr. Arendas allegedly made regarding Officer Curran were heard over a speaker connected to his, when he was speaking to himself. RP 608. In this context and under these circumstances, a reasonable speaker would not foresee his statements would be taken seriously.

The State's reliance on the reaction of the listeners is contrary to First Amendment jurisprudence that adheres to a speaker-based standard, rather than a listener-based standard. The State's reliance on allegations of conduct subsequent to the charging period is in violation of ER 404(b).

The State's concession that the filing fee and DNA fee should be stricken is well-taken. The concession is dictated by RCW 10.101.010 (a) – (c); RCW 36.18.020(2)(h); RCW 43.43.7541, and *State v. Ramirez*, 191 P.3d 732, 747-49, 426 P.3d 714 (2018).

For the foregoing reasons, and for the reasons set forth in the Brief of Appellant, Mr. Arendas requests this Court reverse his convictions obtained in violation of his constitutionally protected right to free speech. Alternatively, Mr. Arendas request this Court strike the improper legal financial obligations. In the event that is the sole relief granted, Mr. Arendas concurs with the State to amend the Judgment and Sentence without a hearing.

DATED this 20th day of February 2019.

Respectfully submitted,

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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF FEBRUARY, 2019.

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