

FILED
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 KLIKITAT COUNTY

BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-271

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A. ASSIGNMENTS OF ERROR

1. The State produced insufficient evidence Mr. Arendas's custodial statements were true threats, as required by the harassment statute, RCW 9A.46.020, and the First Amendment.

2. The trial court erred when it imposed legal financial obligations that included fees for filing a criminal complaint and DNA¹ collection.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional right to freedom of speech requires statutes that criminalize pure speech be narrowly construed. Thus, the harassment statute that criminalizes threatening speech must be confined to "true threats." The United States Supreme Court has described true threats as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," and where the speaker has "the intent of placing the victim in fear of bodily harm or death." Here, there was no evidence Mr. Arendas actually intended to place the alleged victims in fear of bodily harm or death, rather than to express his frustration and anger. Under these circumstances, did the State fail to

¹ Deoxyribonucleic acid.

prove a true threat as defined by the United States Supreme Court, rendering the convictions unconstitutional?

2. The Washington Supreme Court has defined true threats as “statements made in a context in which a reasonable speaker in the defendant's place would foresee that his statement would be interpreted as a serious threat to cause bodily injury or death.” Here, Mr. Arendas made statements about harming or killing two correctional officers, but the statements were not made directly to the officers, he was in custody pending sentencing for two other offenses, and he frequently made allegedly threatening statements about other officers and fellow inmates. Under these circumstances, did the State fail to prove his statements were true threats under Washington law, rather than an expression of his frustration and anger, rendering the convictions unconstitutional?

3. A criminal filing fee cannot be imposed against an individual who is indigent and a DNA collection fee cannot be imposed against an individual who previously provided a sample. Mr. Arendas was found indigent for purposes of trial and appeal and he provided a DNA sample following a prior conviction in this state. Must the filing fee and DNA collection fee imposed in this matter be stricken?

C. STATEMENT OF THE CASE

Peter J. Arendas was convicted of two counts of harassment by threats to kill two correctional officers, based on statements he made to third parties while he was in custody in Klickitat County Jail. CP 44, 47.² He made the statements while he was in custody pending sentencing on two prior convictions. RP 704-07.

Fellow inmate Brandon Edgmand testified that he heard Mr. Arendas yelling from his cell saying he was going to stab Correctional Officer Tammera Anderson Russell.³ RP 465, 468. “He said he was gonna take his pencil and stab her with it or find a piece of metal ... stab her in the neck multiple times.” RP 468. Mr. Edgmand wrote a note for Ms. Russell to inform her of Mr. Arendas’s statements. RP 472; Ex. 6.

Officer Russell testified she received the note from Mr. Edgmand and took it seriously. RP 561. She escorted Mr. Arendas from the courtroom to the jail after he was convicted in the previous trial, at which time he stated he would stash numerous rifles in the woods to use against the officers involved in that trial upon his release. RP 563.

² Mr. Arendas was also convicted of two counts of harassment by threats to harm the same two correctional officers who were performing official duties at the time the threats were made. CP 46, 49. The two counts were dismissed at sentencing on double jeopardy grounds and are not subject to this appeal. RP 769.

³ Ms. Russell was sometimes referred to as Ms. Anderson.

He added that he knew the officers wore chest protection so he would aim for the faces. RP 563. On another occasion, Ms. Russell heard Mr. Arendas in his cell chanting, “a female CO is gonna die today,” which she interpreted as a threat. RP 577-78. On the other hand, she never employed defensive tactics against him. RP 568. Mr. Arendas was not charged with harassment for the more specific statements he made while being escorted or the generic statements she heard from his cell.

Cassandra Christopher, a control board operator for Klickitat County Jail, testified she overheard Mr. Arendas state he would kill Correctional Officer Tim Curran “if he was in court he didn’t care, he would stand up and he would kill him,” and repeatedly stating “he’s so fucking dead.” RP 606-08. According to Ms. Christopher, she heard the statement over a speaker connected to Mr. Arendas’s cell, apparently speaking to himself. RP 608. She was concerned because Mr. Arendas made “multiple threats against other staff, against other inmates and just his actions and the way he was carrying himself.” RP 609. She explained he did not indicate how he intended to manage that, but she observed him gesture as if holding a gun and make “shooting noises.” RP 609. Accordingly, she notified Officer Curran of Mr. Arnedas’s statements.

Correctional Officer Tim Curran testified he was informed by Ms. Christopher that Mr. Arendas made threats on his life and that he wanted to kill Officer Curran. RP 619. He also testified Mr. Arendas was angry and called him “fucking idiot,” and threatened his life “on multiple occasions, although he did not specify the nature or circumstances of those alleged threats. RP 620-21, 639. In response, Officer Curran purchased a firearm for his home. RP 621.

Mr. Arendas was convicted based on the above evidence. At sentencing on April 11, 2018, the trial court imposed legal financial obligations that included a court filing fee and a DNA collection fee. CP 54-55. At the same time, he was found indigent for purpose of appeal. Effective two months later, the state legislature amended the laws on legal financial obligation to prohibit, *inter alia*, imposition of a criminal court filing fee against an individual who is indigent and to prohibit imposition of a DNA collection fee against an individual who previously provided a sample

D. ARGUMENT

1. Mr. Arendas’s convictions for harassment by threat to kill violated his constitutional right to free speech in that his statements were not true threats.

- a. The offense of harassment by a threat to kill requires proof of an unprotected “true threat.”

The offense of harassment criminalizes “threats.” RCW

9A.46.020. A threat is pure speech. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). The United States Constitution and the Washington Constitution guarantee freedom of speech. U.S. Const. amend. I; Wash. Const. art. 1, sec. 5; *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To comport with the constitutional right to free speech, a statute that criminalizes pure speech must be limited to unprotected speech only, such as “true threats,” “fighting words,” or words that produce a “clear and present danger.” *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 2d 1031 (1942); *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 2d 470 (1919); *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013). Accordingly, the criminal harassment statute has been interpreted as limited to true

threats to comport with the First Amendment. *Williams*, 144 Wn.2d at 207-08.

When a criminal statute implicates speech, the State must prove both the statutory elements of the offense and that the speech was unprotected by the First Amendment. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). Therefore, here, the State was required to prove both the statutory elements of harassment by threats to kill and that the statements were unprotected true threats.

A challenge to the sufficiency of evidence implicates core First Amendment rights and an appellate court must 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.” *Kilburn*, 151 Wn.2d at 49. Rather, the “rule of independent review” requires an appellate court to “freshly examine ‘crucial facts.’” – those facts that are intricately intermingled with the legal question. *Id.* at 50-51. “Also, the appellate court may review evidence ignored by a lower court in deciding the constitutional question.” *Id.* at 51; *accord State v. Locke*, 175 Wn. App. 779, 790, 307 P.3d 771 (2013).

b. Mr. Arendas's statements were not true threats under the subjective-intent standard set forth in *Virginia v. Black*.

Not all threats are “true threats.” *Watts*, 394 U.S. at 707. In *Black*, the United States Supreme Court set forth a subjective-speaker standard for evaluating threatening statements. “When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court’s ruling.” *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). Therefore, to secure a conviction pursuant to the state harassment statute, the State must prove beyond a reasonable doubt the speaker intended to place the target in fear as set forth in *Black*.

In *Black*, the Court considered a Virginia cross-burning statute and stated, “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” 538 U.S. at 539. The Court held the state could ban “cross burning with intent to intimidate,” because [i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. Accordingly, the Court invalidated a portion of the statute that

created a rebuttable presumption that any cross-burning was done with intent to intimidate. *Id.* at 364 (lead opinion of the Court); *id.* at 368 (Stevens, J., concurring); *id.* at 380-81 (Souter, J., concurring in part and dissenting in part); *id.* at 379-80 (Scalia, J., concurring in part and dissenting in part). The Court further invalidated the convictions of all three defendants in two consolidated cases, even though all the defendants burned crosses, the burning crosses caused people to fear harm, and their fear was reasonable in light of the context and history of cross-burning. *Id.* at 348-50, 367-68. The Court concluded that because of the vital values protected by the First Amendment, even statements that cause fear are protected unless the statements were made with a purpose of causing that fear. *Id.* at 360.

Here, Mr. Arendas's convictions were obtained without any evidence of intent to intimidate the correctional officers, as required by *Black*. Thus, absent such evidence, his convictions are in violation of the First Amendment as interpreted by the United States Supreme Court. Mr. Arendas recognizes this argument was rejected by the Washington Supreme Court in *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016). Nevertheless, Mr. Arendas makes this argument to preserve the issue.

In *Trey M.*, the Court stated this argument was also rejected in *Kilburn*. 186 Wn.2d at 894-95. In *Kilburn*, however, the Court rejected the argument that a conviction for harassment required proof the defendant intended to actually carry out the threat, not that the defendant intended to place the target in reasonable fear, as argued here. 151 Wn.2d at 45.

The Court held the harassment statute requires the speaker to “knowingly threaten,” the same mental state found sufficient in *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). 186 Wn.2d at 899. In *Elonis*, however, the Court interpreted a statute that did not require a specific *mens rea*. The Court stated *in dicta*, “There is no dispute that the mental state requirement [of the statute] is satisfied if the defendant transmits a communication ... with knowledge that the communication will be viewed as a threat.” 15 S. Ct. at 2012. That is different than the *mens rea* requirement of “knowingly threaten” contained in the harassment statute, because that knowledge is not restricted to how the statement will be viewed or intended. This distinction was recognized in the dissent in *Trey M.*, “What must a defendant ‘know’ in order to trigger liability under the felony

harassment statute?” 186 Wn.2d at 916 (Gordon McCloud, J., dissenting).

c. Mr. Arendas’s statements were not true threats under the objective speaker standard set forth in *Kilburn*.

In *Kilburn*, the Court set forth an objective speaker-based test for a “true threat.”

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. 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.

151 Wn.2d at 43-44 (internal citations and quotations omitted); *accord Allen*, 176 Wn.2d at 626; *State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010).

Here, Mr. Arendas was in custody and his statements were made while he was pending sentencing on two recent convictions and he did not make the statements directly to the corrections officers.⁴ Common sense dictates that correctional officers are frequent targets of invective

⁴ Although a defendant need not know that a statement will be relayed to the alleged target, a lack of knowledge on this point is part of the totality of circumstances that must be considered in a “reasonable person” inquiry. *See State v. J.M.*, 144 Wn.2d 472, 479-80, 28 P.3d 720 (2001); *Kilburn*, 151 Wn.2d at 44.

from inmates. He was known to jail personnel and fellow inmates to frequently make allegedly threatening statements, but he never acted on those statements.

In *State v. Locke*, over a four-minute period of time, the defendant sent three e-mails to then-Governor Gregoire's official web site. 175 Wn. App. at 785. In the first e-mail, he identified his city as "Gregoiremustdie," and wrote that he hoped she would see a family member raped and murdered by a sexual predator, and that she had put the state "in the toilet." *Id.* In the second e-mail, the defendant again identified his city as "Gregoiremustdie," and wrote that she was a "fucking cunt," and she should be burned at the stake. *Id.* In the third e-mail, the defendant requested permission for his organization called "Gregoire Must Die" to hold an event at the Governor's mansion, he wrote that the event would be "Gregoire's public execution," he invited the Governor to be the event "honoree," the event would last 15 minutes, the media would be invited, and the event would be attended by more than 150 people. *Id.* at 786. The court ruled that the first e-mail, albeit "crude and upsetting," was hyperbolic political speech "threatening personal consequences from the state's policies," rather than a true threat. *Id.* at 791. The court further ruled that the second e-

mail, standing alone, also was not a true threat. *Id.* However, the second e-mail and the third e-mail, considered together, did constitute a true threat because “[t]he menace of the communication was ... heightened by its specificity,” and the defendant “had no preexisting relationship or communication with the Governor from which he might have an expectation that she would not take his statements seriously.” *Id.* at 792-93.

By contrast here, however, Mr. Arendas’s statements in question did not have the specificity of the statements in the third e-mail in *Locke* and, again, he was known by jail personnel and fellow inmates to frequently spew invectives without acting on his statements. In context and under the circumstances, a reasonable person in Mr. Arendas’s position would not foresee that his statements would be interpreted as a serious express of intent to kill the corrections officers, rather than an expression of his frustration and anger. His statements of frustration, however crude, were core hyperbolic speech protected by the First Amendment. *See Watts*, 394 U.S. at 708 (“The language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact.”). “Speech is protected, even though it may advocate action which is highly alarming to the target of the

communication, unless it fits under the narrow category of a ‘true threat.’” *Williams*, 144 Wn.2d at 209 (citations omitted). Here, in the absence of proof beyond a reasonable doubt that a reasonable person in Mr. Arendas’s position would foresee that his statements would be taken as a serious expression of intent to harm or kill the correctional officers, his statement was not a true threat and his convictions for harassment must be reversed. *See Kilburn*, 151 Wn.2d at 54.

d. The proper remedy is reversal and dismissal of the charges with prejudice.

Mr. Arendas’s convictions for harassment were based upon insufficient evidence his treats were true threats, in violation of the First Amendment. A conviction based on insufficient evidence must be reversed. *Kilburn*, 151 Wn.2d at 54; *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). To retry Mr. Arendas for the same conduct would violate the prohibition against double jeopardy clause of the Fifth Amendment. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). In the absence of sufficient evidence to establish Mr. Arendas’s statements were true threats unprotected by the First Amendment, his convictions for harassment must be reversed and the charges dismissed.

2. Pursuant to recent amendments to the laws on legal financial obligations, this Court should order the trial court to strike \$300 in legal financial obligations against Mr. Arendas.

Effective June 7, 2018, the laws on legal financial obligations were amended to prohibit, *inter alia*, imposition of a criminal filing fee against an individual who is indigent and to prohibit imposition of a DNA collection fee against an individual who previously provided a sample. RCW 36.18.020(2)(h); RCW 10.101.010 (a)-(c); RCW 43.43.7541.⁵ The amendments apply prospectively to criminal cases

⁵ RCW 36.18.020(2)(h) provides:

(h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

RCW 10.101.010(3) (a) through (c) provides:

- (3) “Indigent” means a person who, at any stage of a court proceeding, is:
- (a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or
 - (b) Involuntarily committed to a public mental health facility; or
 - (c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; ...

RCW 43.43.7541 provides:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction.

that are on appeal and not yet final. *State v. Ramirez*, No. 95249-3, 2018 WL 4499761 *8 (Wash. Sept. 20, 2018).

Mr. Arendas was sentenced on April 11, 2018 and the court legal financial obligations that included a \$200 court filing fee and a \$100 DNA collection fee. CP 54-55. At the same time, the court found indigent for purposes of appeal. CP 62-63. In his Motion and Declaration of Indigence, Mr. Arendas declared he had no assets, he was unemployed, he had not earned any income in the past 12 months, and he had no other source of income. CP 60-61. In addition, he provided a DNA sample following a prior conviction in this state. Klickitat County Superior Court No. 17-1-00098-3, sub. no. 91, p. 6.

In accordance with RCW 36.16.020(2)(h), RCW 10.101.010(3), RCW 43.43.7541, and *Ramirez*, these fees must be stricken.

E. CONCLUSION

Mr. Arendas's convictions for harassment were based on insufficient evidence he communicated a true threat under either the reasonable-speaker standard or the objective-intent standard of review. Accordingly, his convictions must be reversed and dismissed with prejudice. In the alternative, should this Court affirm his convictions,

this Court should order the trial court to strike the filing and DNA collection fees.

Respectfully submitted this 30th day of October, 2018.

s/ Sarah Hrobsky
State Bar Number 12352
Washington Appellate Project (91052)
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

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RESPONDENT,)	
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v.)	NO. 35988-3-III
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PETER ARENDAS,)	
)	
APPELLANT.)	

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