

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 81864-9

GLEN A. SCHALER

PETITIONER,

V.

STATE OF WASHINGTON

RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

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A. ASSIGNMENT OF ERROR

1. The trial court did not commit error by not instructing the jury on the definition of “true threat” where the harassment statute already operated to prohibit “true threats”.
2. The instructions provided to the jury satisfied the concept of “true threat”.

B. STATEMENT OF CASE

The Respondent incorporates by reference the Statement of the Case in the Brief of Respondent and the Opinion of the Court in the underlying Court of Appeals Case Number 25919-6-III.

C. ARGUMENT

- 1. The trial court did not commit error by not instructing the jury on the definition of “true threat” where the harassment statute operated to prohibit “true threats”.**

The Court of Appeals concluded the trial court erred in failing to instruct the jury on the definition of “true threat” when deliberating the crime of harassment charged under RCW 9A.46.020. *Opinion* at pg. 14. In reaching this conclusion, the Court of Appeals cited to *State v. Johnston*, 156 Wn.2d 355, 127 P.3d 707 (2006) (addressing the language of RCW 9.61.160 – Threats to bomb or injure property); and *State v. Tellez*, 141 Wn.App. 479, 170 P.3d 75 (2007) (addressing RCW 9.61.230 – Telephone harassment).¹ *Opinion* at pg. 9-10.

¹ In addition to being in a different RCW chapter: Malicious Mischief – Injury to Property; RCW 9.61.160 and RCW 9.61.230 contain substantially different language than the harassment statute RCW 9A.46.020, that is at issue in the present case.

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 individual. *State v. Williams*, 144 Wash.2d 197, 207-208, 26 P.3d 890, 896 (2001) (citing *State v. Knowles*, 91 Wash.App. 367, 373, 957 P.2d 797 (1998) (alteration in original) (quoting *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir.1990))).

Williams held that Washington's criminal harassment statute clearly prohibits true threats. It specifically held that the language in the statute: "*A person is guilty of harassment if: ... the person knowingly threatens: ... [t]o cause bodily injury in the future to the person threatened or to any other person;....*" operates to prohibit "true threats". *Williams* at 208 (citing 9A.46.020(1)(a)(i)).² See also, *State v. J.M.*, 144 Wn.2d 472, 478, 28 P.3d 720 (2001).

"True threats" are not protected speech. The reason that "true threats" are not protected speech is because there is an overriding governmental interest in the protection of individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.

² *State v. Williams* 144 Wash.2d 197, 26 P.3d 890, 896 (2001) also differentiated this language from another section of the statute that the Court held did prohibit at least some constitutionally protected speech by prohibiting threats which would not properly be characterized as "true threats" to physical safety where it prohibited threats "*to do any other act which is intended to substantially harm the person threatened ... with respect to his or her ... mental health or safety.*" *Williams* at 208.

E.g., *State v. Kilburn*, 151 Wash.2d 36, 43-44, 84 P.3d 1215, 1219 - 220 (2004).

The criminal harassment statute itself prohibits acts that are true threats. There was no justification for the trial court to define for the jury the definition of "true threats" under the statute. The trial court did not error in failing to give such an instruction.

2. The instructions provided to the jury satisfied the concept of "true threat".

Even if there were a necessity to instruct the jury on the concept of "true threats", the jury instructions that were given, sufficiently informed the jury of the *concept* of "true threats" and prevented a conviction based on a mere expression of protected speech. .

As stated above, a "true threat" is as 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. *E.g., Williams*, 144 Wash.2d at 208-09. A true threat is a serious threat, not one said in jest, idle talk, or political argument. *E.g. Kilburn*, 151 Wash.2d 36, at 43-44.

Kilburn stated that the application of this definition to determine if a "true threat" has been made is an objective standard

that focuses on the speaker; nonetheless, the result should be the same whether the standard focuses on an objective speaker or an objective listener.³

In the present case the jury received WPIC instructions 36.06 Harassment definition; 36.07.02 Threat to Kill – Elements; 10.02 Knowingly definition; and 2.24 Threat definition. *CP 32, 33, 34, 36.and 37*. The jury was instructed that elements of the crime required the defendant “knowingly” threatened to cause bodily injury and the words or conduct placed the victims in “reasonable” fear the threats would be carried out. *CP 34, 35*. Additionally the defendant proposed an instruction that was given to jury stating “A person threatens ‘knowingly’ when the person subjectively intends to communicate a threat.” *CP 39*.

The jury clearly had sufficient instructions to determine beyond a reasonable doubt that the threats made were “true threats” , i.e., not ones said in jest, idle talk, or political argument.

The statutory language contained within the elements instructions

³ The difference between the two tests is largely insignificant. In the vast majority of the cases the outcome should be the same because a reasonably foreseeable response from the listener and an actual reasonable response should be the same. The only case where there might be a different outcome is where the recipient suffers from some unique sensitivity unknown to the speaker. *E.g., State v. Kilburn* 151 Wash.2d 36, FN3 at 45 (internal citations omitted). However, there would be no risk of such a different outcome when applying RCW 9A.46.020, because subsection (1)(b) requires a finding that “The person by words or conduct places the person threatened in *reasonable* fear that the threat will be carried out.” (Emphasis added).

**State v. Kilburn* 151 Wash.2d 36, 45, 84 P.3d 1215, 1220 (Wash.,2004)

and the supporting definitional instructions adequately ensured compliance with the concept of “true threats”.

Moreover, the ultimate determination of whether the statements in question were unprotected speech under the First Amendment is legal question, not a factual question for the jury. In *Kilburn*, the Court held that the rule of independent review applies whenever an inquiry must be made into the factual context to decide if speech is unprotected. *Kilburn* at 52. The court concluded:

An alleged threat to kill under RCW 9A.46.020 must be a “true threat” in the First Amendment sense. Neither the First Amendment nor the statute requires that the State prove that the defendant actually intended to carry out his or her threat in order to convict under RCW 9A.46.020. To determine whether a speaker has made a true threat, an appellate court must review the constitutionally critical facts in the record that are necessarily involved in the legal determination whether a true threat was made.

Kilburn at 54. The jury had sufficient instruction to determine beyond a reasonable doubt that the threats made fell within the concept of “true threats”. Additional instruction was not constitutionally required. The constitutional questions regarding whether the statements implicated First Amendment rights are to be determined by the appellate courts conducting independent review.

D. CONCLUSION

The trial court did not commit error by not instructing the jury on the definition of true threat, where the statute prohibited only true threats. The instructions given already ensured the jury operated within the concept of true threats. The question of whether or not the statements were protected speech fell to the appellate court under the rule of independent review.

Dated this 17 day of February 2009

Respectfully Submitted by:



KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington