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STATE OF WASHINGTON
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No. 90666-1

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ADRIAN BENTURA OZUNA, Petitioner.

STATE'S ANSWER TO AMICI CURIAE BRIEF OF
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
AND WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS

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A. ISSUES RAISED BY AMICI

1. Did the State prove all of the elements of intimidating a witness?
2. Were Ozuna's threats "true threats" unprotected by the Constitutional right to free speech?

B. STATEMENT OF THE CASE

The petitioner, Adrian Bentura Ozuna, was charged with the crime of Intimidating a Witness under RCW 9A.72.110. CP 1. Specifically, he was charged with intimidating a former witness, Augustine Jaime Avalos, between June 8, 2010 and July 9, 2010. CP 1. The charges stem from the following facts:

Mr. Avalos had known Ozuna for a long time, since around 2000. RP 414. In 2008, Ozuna was riding in a car with Mr. Avalos and as a result, became a witness against him. RP 322-3. Mr. Avalos testified in that case. RP 418. Mid-trial, June 12, 2009, Ozuna pled guilty in that case to an agreed sentence of 129 months, or 10 years and 9 months. RP 321, 401.¹

Prior to sentencing, on June 8, 2010, Yakima County Jail Corrections Officer Volland was transporting Ozuna from the second floor of the jail to a unit on the fourth floor. RP 217-8, 222. Pursuant to jail

¹ Sentencing was held July 25, 2010. RP 313.

protocol, Officer Volland went through Ozuna's belongings because of certain restrictions in the fourth floor unit. RP 218. In doing so, Officer Volland found an envelope that had Mark Cole's name listed in the return address section. RP 218. Mr. Cole was housed on the second floor in the same area Ozuna had been housed. RP 222-3, 314. The envelope was collected out of concern that Ozuna was sending mail in someone else's name, a violation of the jail's mail policy. RP 221, 269. Subsequently, Lieutenant Gordon Costello determined that there was a security breach because the envelope contained a letter with threats to another person. RP 269. The letter was submitted to a handwriting expert who concluded that Ozuna wrote the letter. RP 241-2, 260.

The letter, addressed to "primo"² and signed by "primo," contained threats that were clearly aimed at Mr. Avalos. RP 324. The letter reads:

primo~

Hey homie, I just got your [unreadable]. Well it was a blessing to hear from you. It puts a smile on my face to know that your ready to ride for me. I was already losing hope! Well as you already know, I got 10 years 9 mon. cause of a pussy that don't know how to ride or Die. He would rather break weak than to honor our sacred code of silence. He is now marked a rat and a piece of shit in my book. He has sealed his fate and now it's just a matter of time. He rode with me and was given my trust and he decided to dishonor that privaledege as well, so all I can say for that fool is, you know what time it is. You guys let him live in luxery for way too long already...how can you live

² Primo means cousin. RP 363.

with a rata³ like that and still be able to rest in peace in that puto's presence? I hope and pray for satisfaction before I leave this building and may that fool suffer and Die in his rat hole. fucken snitch bitch rat! fuck [unreadable]. I hurt and suffer every day just knowing that my kids are gonna grow up to hate there Dad cause I wasn't there for them. That puto took 10 years of my life and a fucken leva from my Barrio, "my Big homie" "Gorge" Lol. living in the same house as him...what a carnal huh? I know I seen weakness in [unreadable] pussy. Buster's over there just laughing knowing that Gorge could of did something but just decided to let that puto slide and live under the same roof with him. That [unreadable] ain't from my Barrio! Tell that fool he's a piece of shit just like him. Let 'em know that this is Campana Gang! He puts the crack in our Bell. no loyalty, no honor, no heart! ask him what he lives for cause it ain't for our campana⁴ no more! Tell him he's as good as dead to me.

Pero check it out primo. let that fool fear the wrath and let him know the rata that he is and tell him that I said that Bad things come to those that snitch. May he rest in piss.

Tell Gorge he better take my Barrio off of him to cause if he doesn't, I will.

Well [unreadable] primo. I know that your living good pero just put yourself in my shoes, if the tables were turned, that shit would have been taken care of a long time ago. no hesitations! But that's just me, my heart's in the rite place. What about your's? I know your down cause I know you, I just don't understand why it's token you so long. Well whatever the reason, let it be put to the side and action taken. One day the tables may turn and on that day, I'll show you how shit's done. I appreciate you shooting me these lines [unreadable] you gave me hope. So now you know what I want primo, don't hesitate vato. take action. reep the rewards later. Don't think, just act, thinking is already hesitating. Hit me up when after the shit get's

³ Rata means rat or snitch. RP 446.

⁴ Campana means bell. RP 442.

handled. Do it on the 25 cause that's when I have court. I want to have a smile on my face knowing that that fool's getting a lil taste of what's coming to him. The 25 is the day I get sentenced. Good looking out primo, don't let me down fucker! I knew I could depend on you, a bit late but better late than never, que-no. piloto. Lol. Piloto these nuts! Fuck that fool! The LVLs⁵ can have him, fucken traitor! Did you know he set up the lil homie from my Barrio just to save his own ass that's why he got stabbed cause he didn't do it rite. we got proof that he did it. talk about walking Dead man! Tell 'em that Vanessa's gonna be the one to set him up for us. mark my words! show him how set ups are done. there just waiting for him to get out. Lol. let's see how much she really loves him. That why she' all over fifi's dick. Love is just a fantasy for fools! weakness that we specialize on. satisfaction will be mine! Let 'em know that he fucked up.

I heard you learned your lesson? I caught Rocio visiting another vato or [unreadable]? I heard some shit like that. I also heard that you let him slide...Don't tell me that your getting weak fool!? sucks huh well as for clown If I ever see him, its on sight. I got you.

On the 26 i'm gonna have the homegirl look you guys up on the computer and I hope and pray that I can keep that smile on my face. see you soon primo! It's a small world. much love and Respect and I hope it means something to you cause I don't give it to everybody. Only few are chosen.

~primo~

SE 1D (errors in original). Mr. Avalos was shown the letter on June 22, 2010 because Detective Rollinger of the Sunnyside Police Department was concerned for his safety. RP 325. Mr. Avalos was cooperative and gave a recorded interview. RP 325-6.

⁵ LVLs refer to Lower Valley Locos. RP 279.

On June 25, 2010, Ozuna made a call from the jail discussing the letter. RP 346. The call was recorded and admitted at trial. RP 382, SE 11. In that call, Ozuna told his father how he got wrote up for witness tampering and was concerned about the judge seeing the letter. RP 390. He told his father what he was going to tell the judge—that he was mad and in a time of passion at the time he wrote it. RP 390.

Two weeks later, on July 9, 2010, Mr. Avalos was hit in the back of his head while being transported to court. RP 294-5, 301, 323, 342. The assault resulted in a head injury and a laceration to his mouth, both requiring stitches. RP 298, 342-3. David Soto, a fellow Sureño, was written up for the assault. RP 300. After the assault, an officer safety alert was written to keep Mr. Avalos separate from any gang members, including Sureños. RP 305.

Officer Merriman testified that one of the most vulnerable times for inmates is while being transported to court because “keep separate[s] get overlooked and information [doesn’t] get passed along.” RP 492. In other words, an inmate who is supposed to be kept separate from Sureños might be in an area where there are other Sureños. RP 492.

Mr. Avalos testified at the witness intimidation trial. When asked if he had received any threats prior to the assault, he answered, “People talk a lot through doors and stuff.” RP 419. He said that this occurred

before and after he testified. RP 419. When asked how he was threatened, he said “people yell things through the doors and you can’t see who it is, they just yell things out.” RP 422.

Mr. Avalos testified that someone named George had been sent to the faith-based “God Pod” in the jail after he went there. RP 417. Mr. Avalos said that George didn’t assault him, however. RP 417.

Detective Rollinger testified that George Garza had in fact been housed in the “God Pod” with Mr. Avalos. RP 350.

Sunnyside Police Department’s gang expert, Officer Ortiz, testified that Ozuna is a self-admitted member of the street gang Bell Garden Locos or Lokotes (BGL). RP 432, 439. He testified that Mr. Avalos was associated with BGL as well and that the rival gang to the BGL is the Lower Valley Locos (LVL). RP 441, 444.

At trial, Ozuna did not testify, but called 2 witnesses, Brandon Perron, and Officer Merriman. Mr. Perron testified that he had been a Sureño for 10 years. RP 473. He testified that he and Ozuna were in separate pods in the jail in June of 2010 but communicated through letters. RP 474. Mr. Perron testified that he received a letter from Ozuna to forward a message to leave Mr. Avalos alone. RP 475. He knew that Ozuna was in trouble in connection with Mr. Avalos. RP 476. The note identified Mr. Avalos by his first name “Jaime” and as being “dark with a

white spot in his hair.” RP 479. Mr. Perron said that he forwarded the message to “leave him alone, anybody that came across him.” RP 476.

Officer Merriman testified that Ozuna was seen as a “shot caller,” also known as a “tank boss.” RP 448, 492. A “tank boss” is an inmate that has enough control and power over other inmates that he can control the activity that goes on in a given housing area. RP 292. The “tank boss” makes the decision and gets the word out when retaliation is ordered against a snitch. RP 448, 490.

In closing arguments, Ozuna conceded that the letter was written by him. RP 547. His attorney argued that even if Ozuna intended for a hit to happen, he very well could have changed his mind. RP 556. Ozuna also conceded that there was no indication that the attacker, David Soto, even knew Mr. Avalos. RP 553.

Ozuna was convicted of intimidation of a witness on October 5, 2012. He was sentenced to 120 months. CP 196. He appealed and the Court of Appeals upheld his conviction. This Court has accepted review.

C. ARGUMENT

1. There was sufficient evidence of all the elements of witness intimidation.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to

find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining the sufficiency of evidence, circumstantial evidence is no less reliable than direct evidence. State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975). Furthermore, the specific criminal intent of the accused may be inferred from the conduct where it is “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of intimidation of a witness are as follows:

- (1) That on or about (date), the defendant directed a threat to a former witness because of the witness’s role in an official proceeding; and
- (2) That this act occurred in the State of Washington.

WPIC 115.51. Amici argue that the State has not proven that Ozuna “directed a threat” because the mere act of writing down words is not directing a threat. (Brief at 6). The entire argument in this regard relies on the incorrect assumption that Ozuna was prosecuted merely for possessing a letter with threats in it. This ignores all of the other evidence in the case and is not what he was convicted of.

Ozuna was convicted of intimidating Mr. Avalos between June 8 and July 10, when the assault occurred. The letter was simply one piece of evidence showing that he directed a threat during this time period. There was also testimony at trial that inmates in the jail were yelling things at

Mr. Avalos through the doors and that consistent with Ozuna's letter, George had been sent to the "God Pod" to take care of Mr. Avalos and failed to do so. On top of that, there was an actual assault on Mr. Avalos at a time when he was vulnerable to attack—during transport to court. This was also an attack from a fellow Sureño, whom Mr. Avalos had no issues with and didn't even know. And it was an unprovoked attack that came from behind Mr. Avalos.

Furthermore, if Ozuna never directed a threat, then why did he have to tell a fellow Sureño to get the word out for everyone to leave Mr. Avalos alone? The defense testimony bolstered the State's case in that it showed that Ozuna was calling the shots in the jail via written letters to a fellow Sureño who was in a separate pod at the jail. RP 474. This was in addition to testimony that Ozuna was known as the "tank boss" in jail, someone who would be responsible for ordering a hit against a snitch. RP 448, 492. And the timing of the assault, just a month after the letter was found, was no coincidence.

It was also evident at trial that Mr. Avalos was still being intimidated. The State had to use his recorded statement to refresh his memory. RP 421. Mr. Avalos also minimized a lot and did not remember or recall a lot of the time during his testimony. RP 413-428. Given that he was assaulted after the last time he testified against Ozuna, it was clear

to everyone that he did not want to be testifying again. He was only there because he was subpoenaed to testify. RP 414, 417. He testified that just being in court is not good. RP 417.

When viewed in the light most favorable to the State, while each piece of evidence, in and of itself, might not be enough, when considered as a whole, there was sufficient circumstantial evidence for a rational trier of fact to find that Ozuna directed a threat to Mr. Avalos between June 8 and July 10. The letter was simply one piece of evidence and it was evidence of his intent. Amici seem to be arguing that direct evidence is needed to prove the charge. But the law doesn't require that.

Amici argue that the State did not prove "an intentional act of transmitting speech to another person." (Brief at 7). As support, they cite State v. Avila, 102 Wn.App. 882, 10 P.3d 486 (2000), which involved the crime of intimidating a teacher. That case talked about intent to "utter" a threat. Uttering, however, can include speech as well as expressing with words.⁶ Here, the State only had to prove that Ozuna directed a threat. There is no requirement of "transmitting speech" in RCW 9A.72.110.

⁶ Utter: a: to send forth as a sound <utter a sigh>, b: to give utterance to : pronounce, speak <refused to utter his name>, c: to give public expression to : express in words <utter an opinion>. Merriam Webster's Dictionary.

This is evident from cases cited by amici, including the Illinois case of People v. Libbra, 268 Ill. App. 3d 194, 643 N.E.2d 845 (1994). In Libbra the Court stated that:

...the method of communication is not an element of the offense, and the methods of communication listed in the statute are not exclusive to other methods that may be conceived by those who intend to intimidate others.

268 Ill. App. 3d at 199 (citations omitted). The court concluded that leaving a picture of a tombstone under a rock at the victim's place of business was one method of communicating threats. The court explained its reasoning:

The defendant in the case at bar used just such novel means of conveying his threats, including yard signs, newspaper pictures and articles, television, and cryptic pictures left under rocks in front of the victim's place of business. We refuse to construe the intimidation statute to require such an absurd result that the more bizarre or indirect the means of delivering the threat the more likely the defendant would not be in violation of the statute.

Id. at 198-99. Similarly, in the Kansas case of State v. Quinones, also cited by amici, Quinones made throat-slicing gestures while a witness was testifying against Quinones's son. 42 Kan. App. 2d 48, 50, 208 P.3d 335, 341 (2009). The witness said that he never saw the gesture. Id. Quinones

argued that the State failed to prove that the threat was communicated. The court held that the Kansas intimidation statute only required someone to perceive the threat and that a bailiff and juror has seen the gesture. Id. at 55. In sum, there was no requirement of “transmitting speech.”

Amici also argue that intent cannot be inferred from “mere possession.” First of all, this is not a case of mere possession of a letter. Mr. Avalos was yelled at by other inmates and actually assaulted by a fellow Sureño. Secondly, the statute does not require any element requiring possession of an item. The cases cited that deal with inferring intent from possession of controlled substances or forged documents are all distinguishable.

2. Ozuna’s threats were “true threats” unprotected by the Constitutional right to free speech.

Amici claim that Ozuna’s threats were protected by the Constitution under his right to free speech. The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.” U.S. CONST. amend. I. This generally prohibits government interference with speech or expressive conduct. State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998). But certain types of speech, such as “true threats,” are not protected. Id. 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].” Id. (citations omitted). This is an objective standard. State v. Johnston, 156 Wn.2d 355, 360, 127 P.3d 707 (2006). The jury was instructed as to this standard in this case. CP 160.

A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43 (citing United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983)). Stated another way, communications that “bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole” are not true threats. State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010). Whether a statement is a true threat or a joke is determined in light of the entire context. Kilburn, 151 Wn.2d at 46, 48. Further, “[t]he speaker of a ‘true threat’ need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious.” Schaler, 169 Wn.2d at 283 (citation omitted).

Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. State v. Johnston, 156 Wn.2d 355, 365, 127 P.3d 707 (2006). As explained in Kilburn, however, a rule of independent appellate review applies in First Amendment speech cases. An appellate court must make an independent examination of the whole

record, so as to assure itself that the judgment does not constitute a forbidden intrusion on the field of free expression. Kilburn, 151 Wn.2d at 50. The appellate court is required to independently review only crucial facts--those so intermingled with the legal question as to make it necessary, in order to pass on the constitutional question, to analyze the facts. Id. at 50-51. Thus, whether a statement constitutes a true threat is a matter subject to independent review. Johnston, 156 Wn.2d at 365.

In this case, it is impossible to interpret the threats in Ozuna's letter as anything other than true threats. Ozuna was very specific about the fact that he wanted action taken against Mr. Avalos and was upset that nothing had been done when there was an opportunity to take action. He was specific about the date he wanted retaliation to take place, his sentencing date. He also wanted follow-up to make sure that it happened. This was no joke. When Lieutenant Costello read the content of the letter he considered many parts to be threatening and concerning. RP 278-85.

Amici rely on State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004), a harassment case, for their claim that this is a case of "private thoughts" of a person. The Kilburn court stated the following:

...the harassment statute itself does require a mental element. The statute requires that the defendant "knowingly threatens" RCW 9A.46.020(1)(a)(i). This means that "the defendant must subjectively know that he or

she is communicating a threat, and must know that the communication he or she imparts directly or indirectly is a threat of intent to cause bodily injury to the person threatened or to another person.” J.M., 144 Wn.2d at 481. Thus, one who writes a threat in a personal diary or mutters a threat unaware that it might be heard does not knowingly threaten. Id.

151 Wn.2d at 48.

Amici want this same standard applied to the witness intimidation statute. First of all, Ozuna’s case does not amount to a threat written in a personal diary. By putting another inmate’s name in the return address section, he was trying to distance himself from the contents of the envelope. If his own name was on it, he would be more likely to be associated with the letter inside. If it was simply a “private diary,” why did he make an effort to conceal who had written the letter? Here, we have an extremely detailed letter, addressed to “primo” and signed by “primo.” Since “primo” means cousin in English, it is likely Ozuna was writing it to one of his cousins. This would explain why he addressed it to “primo” and also from “primo.” The letter was then placed in an envelope with a return name and address, as well as a delivery name and address. In addition, there is the fact that the threat was ultimately carried through with a physical assault on the witness.

Second, Ozuna did not simply “mutter a threat unaware that it might be heard.” The direct and circumstantial evidence in this case shows that he directed a threat to Mr. Avalos with every intent that it be heard and carried out. Ozuna also knew that the jail staff might read the letter because he was violating the jail’s mail policy at the time the letter was found. Putting another inmate’s name on the letter is a common way that inmates circumvent jail policies. RP 90. Ozuna had a similar violation of jail policy in 2009 and was put on the “mail watch list” as a result. RP 49. Therefore, he knew that his letter could be seized and read because he was violating the jail’s policy, something he had been caught doing before.

In sum, a reasonable person in Ozuna’s place would foresee that his statements would be interpreted as threats. The jail officers were concerned and viewed his statements as threats. Detective Rollinger was also concerned. And after being properly instructed, the jury agreed that his threats were true threats. As such, Ozuna’s threats were not protected speech under the Constitution.

D. CONCLUSION

The Court of Appeals decision should be affirmed. There was sufficient evidence to prove all of the elements of intimidation of a witness

beyond a reasonable doubt. This was not a case of “mere possession of writings.” Furthermore, the threats were “true threats.”

Respectfully submitted this 29th day of April 2015,



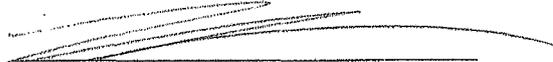
TAMARA A. HANLON, WSBA # 28345
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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on April 29, 2015, by agreement of the parties, I emailed a copy of State's Answer to Amici Curiae Brief of American Civil Liberties Union of Washington and Washington Association of Criminal Defense Lawyers to: Nancy Talner, Travis Stearns, Suzanne Elliott, and Dennis Morgan at talner@aclu-wa.org, travis@washapp.org, suzanne@suzanneelliottlaw.com, and nodblspk@rcabletv.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29th day of April, 2015 at Yakima, Washington.



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Subject: RE: 906661 - State of Washington v. Adrian Ozuna

Attached for filing is State's Answer to Amici Curiae Brief of ACLU & WACDL

- case name: State of Washington v. Adrian Bentura Ozuna
- case number: 90666-1

Sincerely,

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