

65921-9

65921-9

NO. 65921-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES BALLEW,

Appellant.

2010 JUN 21 PM 1:33
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED.

1. Evidence is sufficient to establish a true threat, which may be prohibited without violating the First Amendment, if a reasonable person in the speaker's position would foresee that the threat would be interpreted as a serious expression of intention to carry out the threat. The defendant called 911 and reported in a serious tone of voice that he had five bombs placed at the airport and instructed them to "go find them." Was the evidence sufficient to establish a "true threat?"

2. The state supreme court has expressly approved the definition of true threat that was given in the jury instructions. Did the trial court err in giving the instruction?

3. A prosecutor does not commit misconduct by drawing a historical analogy to make a point that goes to a critical issue in the case, when the analogy is drawn in a way that is not inflammatory. The prosecutor referred to John Hinckley to illustrate the point that threats made by people who are mentally ill could be taken seriously. Did this argument constitute misconduct?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

James Ballew was charged with the crime of Threats to Bomb or Injure Property, pursuant to RCW 9A.04.010. CP 1. The trial court found Ballew competent to stand trial. CP 24-25. A jury found him guilty as charged. CP 26. Ballew was sentenced to nine months of confinement, which he had served prior to sentencing. CP 60. After sentencing, Ballew's motion for new trial based on his claim of prosecutorial misconduct was denied. CP 64; RP 9/10/10.

2. FACTS OF THE CRIME.

On October 17, 2009, James Ballew placed a telephone call to 911 and requested to speak to Port of Seattle police officer Darin Beam. RP 7/1/10 15-16. He was advised by the Port of Seattle dispatcher that Officer Beam was off duty and unavailable. RP 7/1/10 16. Ballew told the dispatcher that he had directed five people to place bombs around the Seattle airport. RP 7/1/10 16. Ballew would not identify himself, and said he would only give information to Officer Beam. Ex. 1. Apparently angered that Officer Beam was not available to talk with him, Ballew stated, "If he can't call, I'll just let a bomb or two go off." Ex. 1. When asked

where the bombs were, he stated "Go find them." Ex. 1. He then hung up. RP 7/1/10 16. A recording of the call was played for the jury. RP 7/1/10 17; Ex. 1.

Officer Beam listened to a recording of the call. RP 7/6/10 39-40. He identified the caller as James Ballew, a man he had contact with at the airport three days earlier. RP 7/6/10 40. Ballew had a distinctive southern drawl. RP 7/6/10 40. In the prior contact, employees at the Delta airlines counter had called police because Ballew was very belligerent, and was trying to buy a ticket to Atlanta with a promissory note. RP 7/1/10 92; 7/6/10 31-32, 34. Beam spoke with Ballew for approximately half an hour and then escorted him out of the airport. RP 7/6/10 32, 38.

Officer Robert Stecz of the Port of Seattle police went to Harborview Medical Center where it was determined that Ballew was located when he made the 911 call. RP 7/1/10 22, 94. Ballew asked to speak to Officer Beam, and stated that he would tell Officer Beam the location of the five explosive devices. RP 7/1/10 98, 100. Ballew then made a number of delusional statements, claiming that he had worked directly for the President and that the bombs could not be detected by X-ray, dogs or electronic devices. RP 7/1/10 101-02, 103.

Port of Seattle officers conducted a sweep of all unsecured areas of the airport and found no explosive devices. RP 7/1/10 48.

C. ARGUMENT.

1. THE CONVICTION IS SUPPORTED BY
SUBSTANTIAL EVIDENCE.

Ballew contends that the evidence presented at trial was insufficient to support his conviction for threats to bomb or injure property. He is incorrect. There was substantial evidence presented at trial that Ballew threatened to bomb the airport and also communicated information regarding that threat knowing it was false.

In general, in reviewing a challenge to the sufficiency of the evidence, the appellate court must view the evidence in the light most favorable to the State, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences must be drawn in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

However, in determining whether evidence was sufficient to support a conviction where First Amendment concerns are raised, the standard of review is more stringent than the usual sufficiency standard. The appellate court undertakes an "independent review" of the crucial facts that bear on First Amendment issues. State v. Kilburn, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004). However, the appellate court must defer to credibility findings made by the trier of fact. Id.

In addition, any statute that criminalizes a form of speech "must be interpreted with the commands of the First Amendment clearly in mind." State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (quoting State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001)). In order for a statute that prohibits threats to comply with the First Amendment, the statute must be interpreted as proscribing only "true threats." State v. Johnston, 156 Wn.2d 355, 364, 127 P.3d 707 (2006). 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 person." Id. at 361. Thus, in defining statutes that prohibit threats, including RCW 9.61.160, Washington courts

have defined the term "threat" as used in those statutes as prohibiting "true threats" only. Id. In a case where the defendant is being prosecuted for communicating a threat, the evidence must be sufficient to establish that the threat communicated was a "true threat." State v. Schaler, 169 Wn.2d 274, 290-91, 236 P.3d 858 (2010).

The crime at issue in this case is defined in RCW

9.61.160(1) as follows:

It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with the intent to alarm the person or persons to whom the information is communicated or repeated.

An independent review of the crucial facts in the present case, with deference to the jury's credibility determinations, should lead this Court to conclude that there was substantial evidence that Ballew committed the charged crime by issuing a "true threat." A reasonable person would foresee that calling 911 and stating that you have had five bombs placed at the airport, and further instructing the authorities to find them, would be interpreted as a

serious expression of an intent to bomb the airport. Nothing in Ballew's tone of voice or word choice indicated that he was joking. He did not simply mutter these words to himself in the grocery store or on a bus. He intentionally called 911 and made the threat. The context of the statement indicates a serious threat, not "jest, idle talk, or political argument." Johnston, 156 Wn.2d at 361. Substantial evidence supports the jury's finding that the threat to bomb the airport in this case occurred in a context where a reasonable person would foresee that the threat would be interpreted as a serious expression of an intent to bomb the airport. Substantial evidence was presented of a "true threat."

Ballew argues that the threat could not be construed by a reasonable person as serious because he was mentally ill. However, this Court knows well that people with mental illness are capable of violence, no matter how delusional their motives. This case is similar to Schaler, where the defendant, who was receiving a mental evaluation at a hospital, made repeated threats to kill two neighbors and was found guilty of felony harassment. 169 Wn.2d at 278-82. The state supreme court concluded there was sufficient evidence that Schaler's threats were "true threats." Id. at 291. The court noted that Schaler's demeanor did not suggest that his words

were idle talk or a joke. Id. The court concluded that a reasonable trier of fact "could have concluded that a reasonable speaker in Schaler's position would have foreseen that his threats would be interpreted as a serious expression of his intention to harm the victims." Id. The fact that a defendant suffers from mental illness does not insulate him from criminal liability under either the harassment statute or RCW 9A.02.020.

Ballew additionally argues that the jury was presented with two alternative means of committing the crime and there was not substantial evidence of both means, thus, requiring reversal. It is true that no unanimity instruction was given to the jury. In a case in which a single offense is defined in terms of alternative means there must be jury unanimity as to which means was committed, unless substantial evidence supports each alternative means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

An alternative means crime is one that provides that the crime can be committed in a variety of ways. State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). However, the mere use of a disjunctive in a statute does not make it an alternative means crime. Id. at 770. Moreover, definitional statutes do not create additional alternative means of committing an offense simply

because they use a disjunctive. State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002).

Here, there are two reasons to hold that RCW 9.61.160 is not an alternative means crime. First, the definition of the crime is in one single subsection, rather than broken into separate subsections as most alternative means crimes are structured. See State v. Smith, 159 Wn.2d 778, 784-86, 154 P.3d 873 (2007). Second, there is substantial conceptual overlap between what Ballew contends are the alternative means, indicating that they are not actually separate means. One who threatens to bomb a building necessarily also communicates information regarding the threatened bombing. In any case where the threat is false, the defendant commits the crime under both definitions by issuing the threat. This Court should hold that RCW 9.61.160 is not an alternative means crime.

Even if RCW 9.61.160 were an alternative means crime, there was substantial evidence of both means presented in this case. Ballew threatened to bomb the airport and communicated information about the threatened bombing, both to the 911 operator and Officer Stecz, knowing the information was false and with the intent to alarm those persons.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE DEFINITION OF A "TRUE THREAT."

Ballew argues that even if the evidence was sufficient to support his conviction, the jury was not properly instructed as to the definition of a "true threat." This claim should be rejected. The jury instruction given in this case has been explicitly approved by the state supreme court.

In a case where the defendant is being prosecuted for communicating a threat, the jury must be instructed as to the constitutional definition of "true threats." Schaler, 169 Wn.2d at 27. The instruction that was given by the trial court defining "threat" in this case included the constitutional definition of "true threat" set forth in WPIC 2.24. CP 38. The instruction read:

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

CP 38. Ballew did not propose a different instruction, or object to the wording of this instruction. RP 7/6/10 54-55.¹

¹ Defense counsel argued that the definition of threat should have been placed in the "to-convict" instruction, but did not argue that the term was improperly defined, or propose a different definition. RP 7/6/10 54-55.

This instruction was expressly approved by the state supreme court in State v. Schaler, 169 Wn.2d at 287 n.5. In Schaler, the court held that failing to supply the definition of "true threat" to the jury was error. Id. at 287. However, the court noted that the error was unlikely to arise in future cases because the proper definition had been incorporated into Washington Pattern Jury Instruction 2.24, the instruction that defines "threat." In footnote 5, the court expressly approved of this instruction, stating, "Cases employing the new instruction defining 'threat' will therefore incorporate the constitutional mens rea as to the result." Id. at 287 n.5. The court also clarified that the mens rea required by the First Amendment "true threats" standard is simple negligence. Id. at 287.

In the present case, the trial court was provided with the proper definition of threat, which encompassed the constitutional limitation that only "true threats" may be prohibited by law, and that a "true threat" requires that a reasonable person would foresee that the statement would be interpreted as serious. CP 38. There was no error in instructing the jury.

Ballew argues that Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), requires the State to prove

that the defendant *intended* to communicate a serious threat. As noted above, the Washington Supreme Court has rejected this interpretation of Virginia v. Black, finding that the mens rea required to be a "true threat" for constitutional purposes is simple negligence, not intent. Schaler, 169 Wn.2d at 287.

The Court in Virginia v. Black was not setting forth a minimum definition of "true threats." In that case, the defendant was convicted of violating Virginia's cross-burning statute, which prohibited the burning of a cross "with the intent of intimidating any person." Virginia v. Black, 538 U.S. at 348. In finding that Virginia's prohibition on cross burning was constitutional, Justice O'Connor noted in her plurality opinion that "'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." Id. at 359 (emphasis added). The question for the Court was whether Virginia's ban on cross-burning was unconstitutional because it was not content-neutral. Id. at 360. A majority of the Court held that, due to the long and pernicious history of cross burning as a signal of impending violence, the state of Virginia

could constitutionally ban it even though the ban was not content-neutral. Id. at 363.

Because the statute at issue included intent to intimidate as an element, the Court was not called upon in Black to decide whether that mens rea was constitutionally required, as noted by Justice Stephens in the majority opinion in Schaler. 169 Wn.2d at 287 n.4. The instruction given in this case, which was explicitly approved in Schaler, was sufficient to insure that the statute was applied in a manner consistent with the First Amendment.

Ballew additionally argues for the first time on appeal that the trial court's failure to include bracketed material that regarding "jest, idle talk or political argument" in the definition of true threat is reversible error. The comment to WPIC 2.24 instructs the trial court to "use bracketed material as applicable." WPIC 2.24, Notes on Use. Ballew did not ask the trial court to use the bracketed material. This is likely because there was no reasonable argument to be made that Ballew was joking, or engaged in idle talk or political argument when he called 911 and threatened to bomb the airport. Any error in failing to include the bracketed material was not a manifest error affecting a constitutional right that may be raised for the first time on appeal pursuant to RAP 2.5(a)(3).

"Manifest" requires a showing of actual prejudice. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). To raise a constitutional issue for the first time on appeal the defendant must make a plausible showing that any alleged error had practical and identifiable consequences in the trial of the case. Id. Ballew cannot make this showing. The definition of true threat that was given to the jury was sufficient to apprise the jury of the constitutional standard. Because there was no evidence or argument presented that Ballew was engaged in joking, idle talk or political argument when he made the threat at issue in this case, the failure to include these terms in the definition was not a manifest error having practical and identifiable consequences in the trial.

3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

Finally, Ballew argues that the prosecutor committed misconduct in closing argument. Viewed in context, the prosecutor's argument did not constitute misconduct. The prosecutor's reference to a historical event was germane to the primary issue presented to the jury and was not presented in an

inflammatory manner. The argument did not improperly appeal to the passions or prejudices of the jury.

The appellate court reviews a prosecutor's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). In determining whether prosecutorial misconduct occurred, the court first evaluates whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). Even if misconduct is properly objected to, it does not constitute prejudicial error requiring reversal unless the appellate court finds there is a substantial likelihood that the misconduct affected the verdict. Id.

Prosecutors have a duty to seek verdicts free from passion and prejudice. State v. Perez-Mejia, 134 Wn. App. 907, 915, 143 P.3d 838 (2006). A prosecutor's argument should not appeal to jurors' fear of criminal groups or invoke racial, ethnic or religious prejudice as a reason to convict. Id. at 916. Incitements to

vengeance, exhortations to wage war against crime, or appeals to patriotism are also improper. Id.

A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. Id. It is improper for a prosecutor to exhort the jury to use its verdict to send a message to society about the type of crime at issue. Finch, 137 Wn.2d at 841.

In the present case, the crux of the defense was that the evidence of Ballew's mental instability was such that a reasonable person would not take his threat to bomb the airport seriously. The prosecutor properly argued that mental illness does not render a defendant less dangerous, or less capable of violence. Thus, a reasonable person would take a threat from a mentally ill person seriously.

In keeping with this argument, the prosecutor referred to the assassination attempt against President Ronald Reagan 30 years ago,² stating, "You think about John Hinckley and his decision to shoot President Reagan, and doing so out of some, you know, obsessive love for Jodie Foster. Does anybody really think that,

² John Hinckley attempted to assassinate President Ronald Reagan on March 30, 1981, and was later found not guilty by reason of insanity. [Http://en.wikipedia.org/wiki/John_Hinckley](http://en.wikipedia.org/wiki/John_Hinckley).

that when you hear that, that that's the mind of a -- of a sane person or a cogent person, but it's not something that you can discount, and sometimes it's true." RP 7/6/10 67. Defense counsel's objection to the argument was overruled. RP 7/6/10 66-67. In denying the motion for new trial, the trial court expressed its opinion that the argument was not inflammatory: "I would suggest that historical references in the context of advocacy are not necessarily misconduct [] when you simply are using it to make a point, and not to inflame the jury, that's appropriate." RP 9/10/10 10.

Ballew argues that State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988), stands for the proposition that a prosecutor may never refer to "infamous criminals" in closing argument. The holding of Belgarde is not so broad. In Belgarde, the prosecutor told the jury that the defendant was a strong member in "a deadly group of madmen." Id. at 506. The prosecutor also likened the group members to Kaddafi and the IRA, making lengthy negative associations between the defendant and well-known terrorist groups. Id. In the present case, the prosecutor did not try to inflame the jury by linking Ballew to John Hinckley or any group of dangerous criminals. The challenged argument in this case used a

historical event to illustrate a valid point that was at the heart of the case, and was not misconduct.

Even if the argument was misconduct, there is no substantial likelihood it affected the verdict. The evidence was undisputed that Ballew placed the call to 911, and the jury was able to listen to the call themselves to judge whether a reasonable person would foresee it as a serious threat. Ballew was clearly being serious when he placed the call. There is no substantial likelihood that the brief reference to John Hinckley affected the verdict.

D. CONCLUSION.

The conviction should be affirmed.

DATED this 27th day of June, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. BALLEW, Cause No. 65921-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

6/27/11
Date