

NO. 67675-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH WARREN,

Appellant.

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KELSEY K. SCHIRMAN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

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A. ISSUE PRESENTED

Should this Court reject the defendant's argument that the crime of Threats to Bomb or Injure Property should have the definition of "true threat" in the charging document when Washington courts have held that "true threat" is a term of art and not an essential element of a crime involving a threat?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Elijah Warren was charged with three counts of Threats to Bomb or Injure Property. CP 1-2. Warren was found guilty of all three counts after a bench trial. CP 29-30. Warren was sentenced to eight hours community restitution and three months of supervision on each count; the counts were to run consecutive to each other. CP 17-19.

2. SUBSTANTIVE FACTS

On May 26, May 27, and May 28, 2010, Warren called Franklin High School. CP 26-27. All the calls occurred, respectively, at 7:45 a.m., 7:47 a.m., and 7:46 a.m. 1RP 46-47. All calls originated from the same payphone located in a parking lot at

2801 Martin Luther King Way South. 1RP 46-47. Warren, on each occasion, told a 911 dispatcher that bombs would be going off at Franklin High School, a public school. CP 26-27; 1RP 69.

On each occasion, Seattle Police Department responded to Franklin High School and a search was conducted of the school for bombs. 1RP 68-69. The school was placed on lockdown on each one of these days. 1RP 101-02.

Warren's identity was discovered on May 28, 2010. On that date, officers watched the payphone where the calls originated. 2RP 6-7. Officer Farior observed Warren walk up to the payphone, pick up the phone, and place the phone to his ear for about 10-15 seconds. 2RP 36-37. Shortly after Officer Farior watched Warren use that payphone, dispatch notified officers that the third bomb threat had been made; the threat came from the same phone Officer Farior was watching. 2RP 37. No other person used that payphone before or after the threat was made. 2RP 35-36. Officer Farior observed that Warren was wearing a distinct red backpack with silver lining. 2RP 13.

Officer Farrior obtained surveillance footage from an adjacent gas station from each day and time that the bomb threats were made to Franklin High School. 2RP 14-17. On each day, at the time when each call was made at the payphone, Warren is seen walking towards the payphone. CP 27. Each day he was wearing the same coat and backpack. CP 28.

Officer Farrior's description of the defendant was provided to officials at Franklin High School. 1RP 93-94. A teacher recognized the description provided and told school officials via email that she had a student in her class matching that description: Elijah Warren. 1RP 71.

Warren was located in class in possession of the same coat and backpack seen in the surveillance videos and observed by Officer Farrior. CP 28. Security from Franklin, Maryann Denini, identified Warren from the surveillance video based on the clothes he was wearing, his backpack, and his haircut. 1RP 75, 86.

Warren gave a written statement and confessed to a school security officer, Jason Kerr, that he made the threatening calls on May 26, May 27, and May 28, 2010. CP 29.

C. THE DEFINITION OF "TRUE THREAT" NEED NOT BE INCLUDED IN THE CHARGING DOCUMENT

The term "true threat" is not an element of the crime of Threat to Bomb or Injure Property and therefore is not required to be set out in the charging document.

1. THE CHARGING DOCUMENT.

The crime of Threat to Bomb or Injure is defined in RCW 9.61.160 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 intent to alarm the person or persons to whom the information is communicated or repeated.

The charging document in this case sets forth the elements of the crime in the three separate counts of Threat to Bomb or Injure Property, respectively, as follows:

That the respondent, ELIJAH WARREN, in King County on or about [date specific], did threaten to bomb or otherwise injure any public or private school building; and did communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to who the information is communicated or repeated.

CP 1-2. This was a bench trial, thus no jury instructions were submitted.

2. THE CHARGING DOCUMENT SUFFICIENTLY NOTIFIED THE DEFENDANT OF THE ELEMENTS OF THE CRIME OF THREATS TO BOMB.

Warren was properly notified of the three counts of Threats to Bomb or Injure Property, as he was properly advised of all of the elements. A charging document is sufficient if it sets forth all the elements necessary to constitute the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). The standard of review of a charging document, postverdict, is a two prong test. Id. at 106-08. Warren did not challenge the sufficiency of the charging document below.

First, the court must look to see if all elements can be fairly construed from the charging document. Id. Second, if any language in the information is vague, the court engages in an analysis of whether the defendant was prejudiced from the vague language. Id.

In the present case, the charging document outlined all of the elements of the crime of Threats to Bomb or Injure Property. The language in the information mimics in large part the language

of the statute prohibiting threats to bomb. Therefore, Warren was properly informed of all of the elements of Threats to Bomb or Injure Property.

3. "TRUE THREAT" IS NOT AN ELEMENT OF THE CRIME OF THREATS TO BOMB; IT IS A TERM OF ART.

As this Court has previously held, the definition of "true threat" is not required to be defined in a charging document because it is not an element of a statute involving a threat. See, e.g., State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006); State v. Tellez, 141 Wn. App. 479, 179 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010). Instead, this Court has repeatedly found that "true threat" is a term of art used to describe the permissible scope of threat statutes for first amendment purposes. 141 Wn. App. 479, 484. The language defining a "true threat" is definitional for the element of threat, no different than the language used to define "intent," "recklessness" or "great bodily harm." Thus, the language does not need to be included in the charging document.

Any statute that criminalizes a form of speech "must be interpreted with the commands of the First Amendment clearly in mind." Tellez, 141 Wn. App. at 482 (quoting State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001)). "True threats" are not protected speech, and may be prohibited. State v. J.M., 144 Wn.2d 472, 477, 28 P.3d 720 (2001). Statements that are not true threats are protected speech, and may not be prohibited. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). Thus, in order for a statute that prohibits threats to comply with the First Amendment, the statute must be interpreted as proscribing only true threats. 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 person." Id. Thus, in defining statutes that prohibit threats, Washington courts have defined the term "threat" as used in those statutes as prohibiting "true threats" only. See J.M., 144 Wn.2d at 478 (noting that the harassment statute is defined as prohibiting only true threats).

Washington courts have repeatedly held that definitions of elements are not themselves elements. For example, in State v. Lorenz, 152 Wn.2d 22, 34-36, 93 P.3d 133 (2004), the state supreme court held that "sexual gratification" is not an element of the crime of first degree child molestation, but a term that defines the element of "sexual contact." The court stated, "Had the legislature intended a term to serve as an element of the crime, it would have placed 'for the purposes of sexual gratification' in RCW 9A.44.083." Id. at 34. See also State v. Laico, 97 Wn. App. 759, 764, 987 P.2d 638 (1999) (definition of "great bodily harm" does not add element to assault statute); State v. Marko, 107 Wn. App. 215, 219-20, 27 P.3d 228 (2001) (definition of threat does not create additional elements); State v. Strohm, 75 Wn. App. 301, 308-09, 879 P.2d 962 (1994) (definitional terms do not add elements to statute). Because "true threat" has not been included in the threats to bomb or injure property statute there is no basis to conclude that the legislature intended that term to be an element of that crime. "True threat" is a definition that courts have applied to the element

of threat in order to ensure that statutes do not run afoul of the First Amendment. Like other definitions, it does not add any elements to the statute.

Although a jury should be instructed on "true threat," the courts have not found that this is an element, which must be provided in the charging document. In Johnston, 156 Wn.2d 355, Johnston was charged with threats to bomb under RCW 9A.01.160(1). At trial, Johnston proposed a definition of threat that included "true threat" language. The trial court refused to give the instruction. On appeal, Johnston claimed it was error not to have provided the jury with a definition of "true threat." Johnston, at 358, 364. Before the Supreme Court, Johnston and the State were in agreement that for First Amendment purposes, the threats to bomb statute must be construed to limit its application to "true threats." Johnston, at 359, 363. The parties were in further agreement, and the supreme court concurred, that the jury instructions "were erroneous because they did not *define* 'true threat.'" Johnston, at 364, 366 (emphasis added). Because the trial court had not

provided the jury with a definition of "true threat," the Court remanded the case, requiring that the jury be "***instructed on the meaning*** of a true threat" on retrial. Johnston, at 366 (emphasis added).

Here, as charged, and with this being a bench trial, where the court is presumed to know the law, the judge was required to find beyond a reasonable doubt that the defendant threatened to bomb or injure property on three different dates and those threats occurred "in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat." To date, the defendant has cited no case, and the State has found no case, that has ever held that the language that describes what constitutes a "true threat" is a separate element that must be included in the charging document. Therefore, the information in the present case properly outlined the elements of the crime of Threats to Bomb or Injure Property.

D. CONCLUSION

For the reasons cited above, this Court should affirm Warren's convictions.

DATED this 6 day of June, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
KELSEY K. SCHIRMAN, WSBA #41684
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 Lila J. Silverstein, 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. ELIJAH WARREN, Cause No. 67675-0-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.

Betty A. Huddleston
Name
Done in Seattle, Washington

6/7/12
Date