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NO. 71309-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

2014 APR 21 PM 2:43  
COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D'ANDRE CORBIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE C. SPEARMAN, JUDGE

**BRIEF OF RESPONDENT**

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ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u> .....	6
1. THE JURY PROPERLY FOUND THE DEFENDANT’S STATEMENTS TO BE TRUE THREATS.....	6
a. Relevant Law And Applicable Standard Of Review .....	6
b. The Defendant’s Statements Were True Threats.....	7
2. THE IMPOSITION OF 36 MONTHS COMMUNITY CUSTODY EXCEEDED THE STATUTORY MAXIMUM PURSUANT TO RCW 9.94A.701(9).....	10
D. <u>CONCLUSION</u> .....	11

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bose Corp. v. Consumers Union of United States, Inc.,  
466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) ..... 6

Virginia v. Black, 528 U.S. 343 (2003) ..... 7

Washington State:

State v. Kilburn, 151 Wn.2d 36,  
84 P.3d 1215 (2004)..... 6, 7, 8, 9

State v. Locke, 175 Wn. App. 779,  
307 P.3d 771 (2013)..... 7

State v. Williams, 144 Wn.2d 197,  
26 P.3d 890 (2001)..... 7

Constitutional Provisions

Federal:

U.S. Const. amend. I..... 6

Statutes

Washington State:

RCW 9.94A.535 ..... 1

RCW 9.94A.701 ..... 10

RCW 9A.20.021 ..... 10

RCW 9A.28.020 ..... 10

RCW 9A.46.020 ..... 8

**A. ISSUES PRESENTED**

1. Whether the defendant's statements were "true threats."
2. Whether the condition of 36 months community custody imposed for the crime of attempted assault in the first degree exceeds the statutory maximum.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, D'Andre Corbin, at the time of trial was charged with one count of attempted assault in the first degree and two counts felony cyberstalking, all alleged to be crimes of domestic violence. CP 123-25. The State also alleged that at the time that the defendant committed the alleged acts he had a high offender score resulting in some of the current offenses going unpunished pursuant to RCW 9.94A.535(2)(c). CP 123-25. The jury returned unanimous verdicts of guilty to each crime charged. CP 224, 226, 228.

The defendant was sentenced to 120 months prison for the crime of attempted assault in the first degree – domestic violence, and 60 months prison for each crime of felony cyberstalking – domestic violence, to run concurrently. CP 322-30. Restitution, no

contact with the victim, \$500 victim penalty assessment, \$100 DNA fee and 36 months community custody were also imposed by the court. CP 322-30.

## **2. SUBSTANTIVE FACTS**

On December 14, 2012, Denise Corbin (hereinafter "Denise") was working at the Hyatt Place Hotel located in Seattle, Washington, with co-worker Wendy Bi. 4/23/13 RP 205. During the evening shift, Denise began receiving text messages from her husband D'Andre Corbin (hereinafter "Corbin"). 4/23/13 RP 205. Bi noticed that Denise was being distracted away from work and appeared to be in an argument with Corbin. Bi took the cell phone away from Denise and read some of the messages. Bi noticed that Denise not only became distracted, but aggravated, annoyed and provoked into responding to the defendant's messages. 4/23/13 RP 207. Denise testified that the defendant did tell her to "kill herself" and that he said he was going to kill her but she did not take it seriously. 4/23/13 RP 136-37; Ex. 14. Denise further testified that Corbin only said he would kill her "a couple of times." 4/23/13 RP 137.

That evening, the defendant sent the following text messages:

7:06 pm "Yep merry xmas! I'm about to beat u ass at work pink! See you soon."

7:08 pm "I'm beating your ass. Promise Tramp"

7:10 pm "Ima Kill ur punk ass before I go! Promise! U piss Bitch!"

7:12 pm "Dead! Both of us!"

7:15 pm "Tramp! Got it! Ill be there waiting at 1030 bring them Nigga too bitch! Um knocking you out tonight"

7:17 pm "I'm bout to kill us!"

7:19 pm "I'm punching ur bitch ass for everything tonight! Ur not here u punk!"

7:19 pm "I'm beating ur ass bitch!"

7:21 pm "Got a few! But u!!!? Dead. Promise."

7:22 pm "Laugh if you want dumbin I'm coin to hurt promise."

7:24 pm "Bitch have everyone there when you get here! Don't care bitch. Ur Dead! See you soon. Lom."

7:27 pm "Ur dead"

7:39 pm "Denise I'm, join to try and kill u tonight! Promise! Lol. Have ur new dude there please so call all everybody! Bring the nigga with u! 11 ill still be here to kill u!"

7:39 pm "Been knew that! That's why these bitches  
been filling in but u!? I love that I hate you!  
I will die to kill u! Lets go! I'm here sweets!

7:43 pm "I beat ur pissy ass!"

Ex. 14.

Later that evening, while on shift, Denise left Bi standing at the front desk and walked quickly toward the back kitchen area without warning because she saw her husband approaching the hotel lobby where she worked. 4/23/13 RP 156. While assisting hotel guests, the defendant called Bi by phone and instructed her to get Denise. Bi described the defendant as intense and walked to the kitchen area to find Denise. 4/23/13 RP 214. After calling out for Denise with no response, Bi re-entered the hotel lobby where she was confronted by Corbin. 4/23/13 RP 215. Corbin pushed Bi in the chest and proceeded to the employee area of the hotel. 4/23/13 RP 215.

While the defendant was looking for Denise, Denise went into an office space and called 911 in order to have her husband trespassed from the hotel. 4/23/13 RP 161. While on the phone with the operator Corbin found Denise who then fled through the hotel lobby. 4/23/13 RP 166. Corbin caught Denise after she fell just outside the back door of the hotel. 4/23/13 RP 168. That same

evening, Aaron Bochetti was sitting in his car at a nearby traffic light. 4/24/13 RP 249. Bochetti heard screams from a woman nearby, later identified as Denise, and watched as the defendant struck her repeatedly with his arms and fists. 4/24/13 RP 253-54.

An unknown male pulled Corbin off of Denise and another man pulled Denise away. 4/24/13 RP 261-62. Several minutes later, Daina Harrison was also in a car that same evening and watched as Corbin and Denise argued while walking next to the intersection of Aurora and Denny Way. 4/24/13 RP 270-71. Harrison watched as Denise ran away from Corbin who was chasing her. Corbin then tackled Denise and started punching her in the face. At this same moment, Lt. Greening of the Seattle Police Department arrived and captured the assault on his dash-cam video. 4/24/13 RP 324-29. Denise was on her side laying on the roadway while the defendant was holding her hair and punching the side of her head repeatedly. 4/24/13 RP 324.

While being treated at the hospital, the victim provided a voicemail from the defendant that she had received earlier that evening. 4/29/13 RP 390, 397. After being admitted, the voicemail was played for the jury. The defendant continued to threaten the victim and told her to call the police herself. 5/2/13 RP 546.

C. **ARGUMENT**

1. **THE JURY PROPERLY FOUND THE DEFENDANT'S STATEMENTS TO BE TRUE THREATS.**

a. Relevant Law And Applicable Standard Of Review.

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.

"The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for the truth and the vitality of society as a whole." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). "True threats" are statements where a speaker means to communicate a serious expression of intent to commit an unlawful act of violence to a particular individual or

group of individuals. Virginia v. Black, 528 U.S. 343, 348 (2003). Additionally, indirect threats may suffice to constitute a “true threat.” State v. Locke, 175 Wn. App. 779, 792, 307 P.3d 771 (2013).

Determining a “true threat” is an objective test that focuses on the speaker; 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. State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004); see also State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001). The State need not prove the speaker actually intended to carry out the threat but rather the communication must be of intent to inflict bodily harm. Id. at 46.

b. The Defendant's Statements Were True Threats.

Using an independent review under the court's objective standard, whether a reasonable person in the position of the speaker would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat, it is clear the defendant's statements meet this standard.

“True threats” do not include jokes, playful banter, or idle words – they must be serious threats of violence. Kilburn, at 43. “True threats” are not protected speech because there is an overriding governmental interest in the “protect[ion of ] individuals from the fear of violence, from the disruption that fear engenders, and possibility that the threatened violence will occur.” Id. at 43.

In Kilburn, the defendant was charged and convicted of the crime of felony harassment.<sup>1</sup> Id. at 38. Similar to the crime of felony cyberstalking, it must be proven that the defendant knowingly threatened to kill the recipient or any other person, or do any act intended to substantially harm that person’s health. RP 255. The defendant’s statements in Kilburn were found to have been made in jest or idle talk based on the testimony of eye witnesses and the circumstances of the conversation involving the defendant’s threats. Id. at 53. Unlike the defendant in Kilburn, Corbin made numerous and repeated clear and direct threats to kill Denise or at least inflict great bodily harm by physically beating her. Ex 14. Furthermore, the defendant left a voicemail on the victim’s phone unequivocally expressing his intent to kill her and later appeared at her place of employment. RP 397.

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<sup>1</sup> RCW 9A.46.020.

Although Denise testified that she and the defendant had previously exchanged heated text messages, she also significantly minimized the number of threats to two occasions or messages. RP 135-37. The case did not rest wholly on the testimony and credibility of Denise but also with witnesses Wendy Bi, Jason Lathrop, Aaron Bochetti, Daina Harrison, Lt. Michael Greening and several responding officers. Defense heavily relies upon the testimony of Denise and her assertion of lack of fear to establish that the defendant did not make a knowing threat to kill. This reliance however is misplaced given the objective standard used in Kilburn. Denise's actions are strongly corroborative of the fact that she was placed in reasonable fear because Corbin's texts were a serious expression of violence and his intent to kill her. Denise ran from the front desk when she saw her husband and called 911. 4/23/13 RP 156, 161.

Furthermore text message evidence established the defendant's specific and numerous threats supporting a finding that a reasonable person in the defendant's position would foresee the statements received as a serious expression of intent to kill the recipient, Denise. Ex 14. Not to be discounted in judging the seriousness of the threats is the fact that Corbin did in fact arrive at

his wife's place of employment and physically assaulted her when given the opportunity. The evidence is sufficient to support a conviction.

**2. THE IMPOSITION OF 36 MONTHS COMMUNITY CUSTODY EXCEEDED THE STATUTORY MAXIMUM PURSUANT TO RCW 9.94A.701(9).**

The defendant was sentenced to the maximum term of 120 months for the crime of attempted assault in the first degree – domestic violence, and 60 months for each crime of felony cyberstalking – domestic violence. CP 322-30. Pursuant to RCW 9.94A.701(9), the term of community custody should be reduced when the offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Assault in the first degree is a class A felony, however, because the defendant was charged with attempted assault in the first degree, the crime becomes a class B felony pursuant to RCW 9A.28.020(3)(b). The Statutory maximum for a class B felony is 10 years or 120 months pursuant to RCW 9A.20.021(1)(b).

The imposition of 36 months of community custody in combination with the 120 months of imprisonment exceeds the

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 71309-4-I
	)	
v.	)	CERTIFICATION OF
	)	SERVICE BY MAIL
D'Andre Corbin,	)	
	)	
Appellant.	)	
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Kerri N. Bradford, Paralegal, King County  
Prosecutor's Office, Criminal Division, certifies that  
on August 21, 2014, she personally served Andrew P. Kinner,  
attorney for D'Andre Corbin, with Brief of Respondent  
by postal mail:

Andrew P. Kinner  
Nielsen, Broman and Koch, PLLC  
1908 E Madison St., Seattle, WA 98122

Under penalty of perjury under the laws of the  
State of Washington, I certify that the foregoing is  
true and correct. Signed and dated by me on August 21,  
2014.

  
\_\_\_\_\_  
Kerri N. Bradford