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FILED
Nov 06, 2015
Court of Appeals
Division I
State of Washington

NO. 73339-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

J.K.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY, JUVENILE
DIVISION

The Honorable Deborra Garrett, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

A TEEN'S USE OF HYPERBOLE TO VENT HER FRUSTRATION ON AN INTERNET SOCIAL NETWORKING SITE NEITHER AMOUNTS TO A TRUE THREAT NOR SHOWS AN INTENT TO HARASS ANYONE.

The State's brief conflates two similar but distinct issues raised in J.K.'s opening brief. The first question is whether the evidence failed to establish a true threat. The second question is whether the evidence failed to establish the necessary specific intent.

The "true threat" issue turns on whether a reasonable person in the speaker's position would have anticipated that the threat would be taken seriously. State v. Williams, 144 Wn.2d 197, 206-07, 26 P.3d 890 (2001). It is, thus, an objective inquiry focused on the nature and circumstances of the speech used. State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004). It is a constitutional requirement necessary to avoid chilling the First Amendment right to free speech. State v. Johnston, 156 Wn.2d 355, 363-64, 127 P.3d 707 (2006). In short, the First Amendment requires reversal of J.K.'s conviction unless the State proved she made a true threat.

Due process also requires reversal of her conviction unless the state proved she had the actual intent to harass, threaten, torment, or embarrass S.G. because that is one of the statutory elements of

cyberstalking as defined by the Legislature. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); RCW 9.61.260. The intent element of cyberstalking is a subjective inquiry rather than an objective one. See, e.g., State v. Huynh, 175 Wn. App. 896, 905, 307 P.3d 788 rev. denied, 179 Wn.2d 1007 (2013) (intent to manufacture and deliver controlled substance addresses defendant’s “subjective mental state.”); State v. Byrd, 72 Wn. App. 774, 779, 868 P.2d 158 (1994), aff’d, 125 Wn.2d 707 (1995) (in assault cases, where intent to cause apprehension and fear of bodily harm is seriously contested, jury instructions must expressly require subjective intent). The statute requires proof beyond a reasonable doubt of the speaker’s actual mental state. Id.; RCW 9.61.260.

a. A Reasonable Person Would View J.K.’s Twitter Rant as Hyperbole and Idle Talk, Not a Serious Threat.

Turning first to the First Amendment analysis, the State is correct that a threat can be a true threat without being communicated to the target of the threat. Brief of Respondent at 8. But that is immaterial to J.K.’s argument. J.K. argues her tweets were not a true threat because a reasonable person in her position would not foresee them being taken seriously. The intended recipient of the communication is relevant to whether a person would foresee the threats being taken seriously.

First, S.G. was not one of the intended recipients of her tweets. J.K.'s Twitter followers, the only people who would see her tweets without actively searching for them, could presumably be counted upon to understand her hyperbole. Therefore, a reasonable person in J.K.'s position would not anticipate the statements being taken as a sign of serious intent to do harm. Second, even if S.G. were to learn about it, given the context of high school interpersonal drama and the lack of any other interaction between the two girls, a reasonable person in J.K.'s position would not assume a classmate would take her statements as an actual death threat.

The State's argument also rests on the plain language of J.K.'s tweets. But that plain language is only part of the correct inquiry. The State cites State v. Locke, 175 Wn. App. 779, 790, 307 P.3d 771, 776 (2013) rev. denied, 179 Wn.2d 1021 (2014), but the Locke court declared, "The nature of a threat 'depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.'" Id. (quoting State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003)) (emphasis added).

Locke specifically mentions hyperbole as protected speech: "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.” Locke, 175 Wn. App. at 790 (quoting State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010)). In the context of high school girl drama, hyperbole and idle talk are the most likely explanations of J.K.’s tweets. That is how her Twitter followers, the most foreseeable recipients of the tweets, were likely to understand them.

The State argues I.R. was “concerned to the point where she felt the need to show the Tweets to S.G.” Brief of Respondent at 6. Critically, I.R. never testified that she believed J.K. actually meant to do harm to S.G. That she was “concerned” is one interpretation of her conduct. Another is that she was intrigued by the potential for interpersonal drama and conflict. Her testimony on this point is scant at best. No one asked her why she decided to show the tweets on her phone to S.G. I.R. agreed with the prosecutor’s suggestion that she was “suspicious” and testified she let S.G. take her phone to the office because “It was a serious situation for her.” IRP 60-61. She did not say she viewed J.K.’s statements as a serious threat.

The State, the party with the burden of proof at trial, had the opportunity to ask I.R., presumably a reasonable person, whether she took J.K.’s statements seriously. It did not do so. Moreover, one can infer from I.R.’s testimony that she did not. I.R. also testified that she did not know S.G. would get the school administration or her mother involved to

such an extent. 1RP 61. If I.R. had taken J.K.'s tweets as a serious death threat, she would certainly not have been surprised by S.G.'s decision to involve her mother and the school administration.

- b. Set in the School Context, This Case Is More Akin to *Kilburn* than *Locke*, and Even Under *Locke*, J.K.'s Statements Are Protected Speech.

The State attempts to analogize this case of animosity between high school girls, to a death threat emailed to Washington's governor. See Brief of Respondent at 6 ("This case is similar to *State v. Locke*."). That analogy fails for several reasons. First, the emails in *Locke* were sent directly to Governor Gregoire's office, rather than, as here, to the person's own online acquaintances. 175 Wn. App. at 785. Thus, from the outset, the context of the communication is entirely different.

The State also ignores the *Locke* court's analysis of the first two emails Locke sent. Those emails were found *not* to constitute a true threat. Id. at 791-92. In the first email, Locke listed his city as "Gregoiremustdie" and expressed the wish that then-Governor Christine Gregoire witness horrible things happen to her family. Id. at 791. Locke's use of "Gregoiremustdie" is strikingly similar to J.K.'s "[S.G.]mustdie." Crucially, the court held that this first email alone was not a true threat. Id. Instead, it was "more in the nature of hyperbolic political speech." Id.

The second email, the court found to be a closer call. Id. at 791-92. In that second email, Locke expressed his opinion the governor “should be burned at the stake like any heretic.” Id. Like J.K.’s first tweet expressing the desire to punch S.G. in the throat, this email was more specific about the nature of harm. But despite finding this second email a closer call, the court again concluded there was no true threat, in large part because the “passive phrasing” acted to “blunt[] the implication that Locke is threatening to do this himself.” Id. at 791-92. J.K.’s tweets were also phrased passively, as a desire, rather than an express plan to engage in any action whatsoever. The court declared that, “viewed in isolation, we cannot deem it unprotected speech.” Id. at 792.

The Locke court found a true threat only when it combined the first two emails with an “event request” Locke sent to the governor’s office two minutes later stating that the event would be “Gregoire’s public execution” and requesting that the event be held at the governor’s mansion. Id. at 792. The court relied on the escalation of the messages and the specificity of the final event request, which declared the event would last 15 minutes and requested 150 guests. Id. at 792-93. The court concluded that the details “plainly suggest an attempt to plan an execution.” Id. at 793. J.K.’s tweets, by contrast, suggest nothing of the sort. Additionally, Locke essentially admitted he expected his messages to

be taken seriously when he admitted that he had expected the State patrol to contact him. Id. at 793.

Locke does not support the State's argument. This case is far more akin to State v. Kilburn, where a student's joking statement that he was "going to bring a gun to school tomorrow and shoot everyone and start with you," although "chilling and serious," was *not* deemed to be a true threat. Locke, 175 Wn. App. at 794 (quoting and discussing Kilburn, 151 Wn.2d at 43).

c. The Evidence Was Insufficient to Show J.K. Intended to Harass S.G.

The same circumstances showing a lack of any true threat also show a lack of any specific intent to harass, threaten, or embarrass S.G. The public nature of J.K.'s Twitter account is actually a red herring. The vast scope of publicly available information on the internet in today's world makes any individual piece of information extremely unlikely to be found without a specific search. In that context, an impulsive adolescent, accustomed to broadcasting her innermost thoughts and having them thoroughly ignored, see 1RP 131-32, would not anticipate or intend that they would cause harm to another person. Under the circumstances, the State utterly failed to prove J.K. had any such criminal intent.

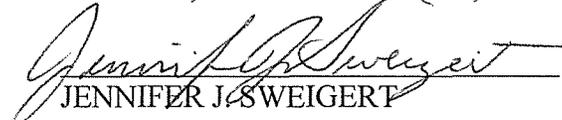
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, J.K. asks this Court to reverse her adjudication of guilt for cyberstalking.

DATED this 6th day of November, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", is written over a horizontal line.

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF NOVEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] J.K.
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SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF NOVEMBER 2015.

X *Patrick Mayovsky*