 73339-7

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Court of Appeals
Division I
State of Washington

No. 73339-7-I

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

STATE OF WASHINGTON, Respondent,

v.

J.K., Appellant.

BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By Evan P. Jones
Deputy Prosecutor
Attorney for Respondent
WSBA #40608 / ADMIN. #91075

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. **Whether there was sufficient evidence to prove that that J.K. intended to harass, embarrass, intimidate, or torment S.G.**

2. **Whether there was sufficient evidence to prove a true threat, as required by the First Amendment.**

C. STATEMENT OF THE CASE

1. Procedural History

On November 26, 2013, the appellant, J.K., was charged with one count of Cyberstalking, under RCW 9.61.260. CP 6. After a fact finding hearing, Commissioner Martha Gross found J.K. guilty of the offense of Cyberstalking. CP 27. The Superior Court, Juvenile Department, affirmed the Commissioner's findings. CP 49. J.K. was subsequently sentenced to six months of probation and 30 hours of community service. CP 30-31. J.K. timely filed a Notice of Appeal. CP 53.

2. Substantive Facts

When S.G. was in the eighth grade she informed her teacher that a classmate (not J.K) was "acting strange" at school. 1RP 93.[1] After school officials investigated the allegation, J.K. and the other student were subsequently from school. 1RP 145-146. J.K. blamed S.G. for the consequences she suffered. 1RP 130. S.G. had no other interaction with J.K. until the incident in this case. 1RP 97.

In November 2013, S.G. was a sophomore attending Bellingham High School. 1RP 86-88. During that semester, S.G. and J.K. had a class together. 1RP 130. On November 7, 2013 and while in the shared class, J.K. posted two messages, known as Tweets, on the social media website Twitter. 1RP 130. J.K. posted the Tweets after seeing S.G. and becoming agitated. 1RP 131. The Tweets stated "Tbh I still want to punch you in the throat even tho it was 2 years ago" and "#[S.G.]mustdie" referring to J.K.'s interaction with S.G. in the eighth grade. 1RP 130-131. The Tweets were public and accessible to anyone on Twitter. 1RP 131; 142.

The next day, on November 8, 2013, S.G. was approached by her classmate I.R. 1RP 88-89. During their conversation, I.R. used her cellphone to show S.G. the Tweets that J.K. has posted the day before.

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[1] Respondent references the three volumes of Verbatim Report of Proceedings consistent with Appellant's brief as follows: 1RP – Mar. 4, 2014; 2RP Mar. 12, 2014; 3RP July 29, 2014. Appellant's Brief at 3.

1RP 89. After reading the Tweets, S.G. became upset, angry, and embarrassed because she felt that her peers had seen J.K.'s Tweets. 1RP 90. I.R. testified that S.G. appeared "shocked and a little bit confused." 1RP 63. I.R. also testified that there were two other students present at the time I.R. showed S.G. the Tweets. 1RP 64.

S.G. then asked to borrow I.R.'s phone to show J.K.'s Tweets to Nicole Lockhart, Bellingham High School's Dean of Students. 1RP 90. Ms. Lockhart testified that during their conversation, S.G. seemed shaky, agitated, and nervous. 1RP 75. After consulting with other school administrators, Ms. Lockhart called the police. 1RP 73-74. J.K. was subsequently charged with Cyberstalking. CP 6.

During trial I.R. testified about using Twitter generally. 1RP 59. I.R. testified that she followed J.K. on Twitter and therefore J.K's Tweets automatically showed up on her phone. 1RP 59. Additionally, I.R. testified that depending on the privacy settings of a person's Twitter account, that person's posts would be searchable and available to the public. 1RP 59. J.K. testified that she knew that her Twitter account was public at the time that she posted the Tweets about S.G. 1RP 131.

After a fact finding hearing, Commissioner Gross found J.K. guilty of Cyberstalking, specifically finding that J.K. acted with the intent to embarrass, harass, and torment S.G. and that J.K.'s Tweets constituted a

true threat. CP 27. The Superior Court affirmed the Commissioner's findings and denied J.K.'s motion to revise. CP 49.

D. ARGUMENT

1. The State presented sufficient evidence that J.K. intended and made a true threat given the plain language of the communication and the context surrounding the statements

Sufficient evidence was presented at the fact finding hearing which demonstrated that J.K.'s Tweets, along with the surrounding context, constituted a true threat. A claim of insufficient evidence admits the truth of the State's evidence and all the inferences that reasonably can be drawn therefrom. *In re Martinez,* 171 Wn.2d 354, 364, 256 P.3d 277, 282 (2011); *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In assessing the sufficiency of the evidence in cases involving true threats, courts perform an independent review, under the First Amendment, to decide if the speech is protected. *State v. Kilburn,* 151 Wn.2d 36, 52, 84 P.3d 1215, 1224 (2004).

True threats are unprotected speech under the First Amendment. *State v. Kilburn,* 151 Wn.2d at 43. True threats are unprotected because there is an "overriding governmental interest in the protection of individuals from the fear of violence, from the disruption that fear

engenders, and from the possibility that the threatened violence will occur." *Id.* The Supreme Court has clarified a true threat as

> 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 at 43; *State v. J.M.,* 144 Wn.2d 472, 28 P.3d 720 (2001). A true threat is a serious one, not uttered in jest, idle talk, or political argument. *State v. Hansen,* 122 Wn.2d 712, 718, 862 P.2d 117, 120 (1993).

In this case, the Tweets posted by J.K. constitute a true threat and are therefore unprotected speech. First, the plain language of the statements made by the Respondent indicate a specific criminal intent and constitute a true threat. Second, the context surrounding the Tweets support the seriousness of the expression.

a. <u>The plain language of the Twitter messages demonstrate that they were true threats which the court may use to infer specific criminal intent</u>

The plain language of J.K.'s Twitter messages indicate specific criminal intent. Courts "may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability." *State v. Locke,* 175 Wn. App. 779, 788, 307 P.3d 771, 775

(2013) *review denied,* 179 Wn. 2d 1021, 336 P.3d 1165 (2014); *citing State v. Goodman,* 150 Wn. 2d 774, 781, 83 P.3d 410, 413 (2004).

This case is similar to *State v. Locke.* In *Locke*, the defendant threatened the life of the Washington State Governor. The defendant sent messages to the Governor using language including "[T]hank you for putting this state in the toilet. Do us a favor and pull the lever to send us down before you leave Olympia" and "you should be burned at the stake like any heretic." *Id* at 785. In that case, Division Two inferred specific criminal intent from the defendant's language and found it to be a true threat. *Id* at 793. In reaching their holding, Division Two reasoned that the messages taken as a whole constituted a true threat. *Id.* Similar to the determination in *Locke,* the plain language of the J.K's Tweets demonstrates specific intent and constitute a true threat. The Tweets posted by J.K. stated "Tbh I still want to punch you in the throat even tho it was 2 years ago" and "#[S.G.]mustdie" 1RP 130-131.

Here, a plain language reading of J.K.'s Tweets were sufficient to make an unrelated third party, I.R., concerned to the point where she felt the need to show the Tweets to S.G. 1RP 58. The Commissioner properly determined that a reasonable person would be "alarmed at hearing that even after two years someone still wants to punch you in the throat." 1RP

163. As evidenced by I.R's reaction and the Commissioner's findings, the plain language reading of the threats indicates that they are a true threat.

Additionally, J.K.'s Tweets constituted an escalation and confirmation of her violent intentions, such that a reasonable person would foresee that the statements would be interpreted as a serious expression of intention to inflict bodily harm. Courts have held where, there appears to be an escalation in the contents of the communications, where multiple threats are made, statements constitute a true threat. *Locke,* 175 Wn. App. at 790. In *Locke,* the defendant sent two separate emails to the Governor of Washington. These emails were deemed to be of a threatening nature. *Locke*, 175 Wn.2d at 791. In that case, the defendant sent more than one email threatening the life of the Governor. The court determined that the statements were much more than hyperbolic political speech and that the multiple messages compounded to reach the level of a true threat. *Id.*

Similar to the defendant in *Locke*, J.K. posted multiple Tweets referring to S.G., which compounded to reach the level of a true threat. The initial Tweet posted by J.K. stated "Tbh I still want to punch you in the throat even tho it was 2 years ago." 1RP 130. Instead of leaving her initial Tweet alone, J.K. reaffirmed and emphasized it by posting a second which stated "#[S.G.]mustdie" 1RP 131. As I.R. testified, a hashtag on Twitter and other social media websites is used when a person chooses to

emphasize a thought or idea. 1RP 66-67. Here, J.K.'s second Tweet was not only threatening based on its plain language stating "#[S.G.]mustdie," but it is also threatening based on J.K.'s usage of the hashtag itself which emphasized J.K's first Tweet.

Appellant argues that in order to prove specific criminal intent, the State must prove that J.K. intended that S.G. learn of the Twitter messages. Appellant's Opening Brief at 7. However, the Supreme Court has emphasized that a statement may constitute a threat even if it does not actually reach the victim. WPIC 2.24 (comment); *See State v. Hansen,* 122 Wn. 2d 712, 717-718, 862 P.2d 117(1993). In *Hansen*, the defendant was charged with intimidating a judge based on his threatening statements to an attorney. *Id*. at 714. In that case, the defendant did not say anything directly to the judge. *Id.* In his appeal, the defendant argued that the State presented insufficient evidence of intimidating a judge based on the fact that there was no evidence presented at trial establishing that the defendant knew his threat would reach the judge. *Id.* at 718. In that case, the Supreme Court held that "a threat may ultimately find its way to the judge, but that is irrelevant with the commission of the crime." *Id*.

Similar to the defendant in *Hansen,* J.K.'s intent that S.G. learn of the posted Tweets is irrelevant. Additionally, in this case, J.K. admits knowing that her Twitter and Tweets were public. 1RP 131. Furthermore,

RCW 9A.04.110(28) defines "threat" as "to communicate, directly or *indirectly* the intent." RCW 9A.04.110(28)(emphasis added). Based on the facts, case law, and the RCWs, the court correctly inferred specific intent.

b. <u>The context surrounding the communication establishes that J.K.'s statements constituted "true threats"</u>

The threatening statements made by J.K. constituted true threats in light of the surrounding circumstances between S.G. and J.K, in particular the negative interaction between the two while in middle school. When analyzing whether a statement constitutes a "true threat," Courts look to the historical relationship between the defendant and victim, analyzing whether there have been past altercations, or in contrast, joking behavior between them. *State v. Kilburn,* 151 Wn. 2d 36, 53, 84 P.3d 1215, 1224 (2004).

S.G. and J.K. have past interactions with each other which place this incident in a negative context. For instance, while in middle school, S.G. informed her teacher about suspicious behavior of a fellow classmate, and J.K. was suspended from school as a result. 1RP 145-146. J.K. assumed that it was S.G. who got her in trouble and was upset by it. Two years later, J.K. again has a class with S.G. and posted the Tweets after "[J.K.] just saw [S.G.] and became agitated." 1RP 131; 145. J.K. is still upset about the interaction two years prior. In addition, both S.G. and J.K.

testified that they have never been friends. 1RP 97-98, 129. Additionally, the court record is void of any joking behavior that has occurred in the past between the S.G. and J.K. The prior relationship between S.G. and J.K. does not suggest that J.K. was merely joking or engaging in idle talk. Finally, S.G. testified that she was upset, angry, and embarrassed by J.K.'s Tweets. 1RP 90. J.K. testified that she regretted the Tweets, that the Tweets were not a joke, and admits that S.G.'s reaction of "shaking" was reasonable. 1RP 136; 142; 145. Based on S.G. and J.K.'s history and S.G.'s reaction to J.K.'s Tweets, the Commissioner properly found that J.K.'s Tweets constituted a true threat.

E. CONCLUSION

Based on the arguments above, the State respectfully requests this Court affirm the J.K.'s conviction of Cyberstalking.

Respectfully submitted this 7 October 2015

Evan Jones

EVAN P. JONES, WSBA #40608
Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Tassi Schussman 10-7-2015

Legal Assistant Date